IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
v.) Criminal Action No.:
) 2:17cr126
DARYL G. BANK,)
)
Defendant.)

TRANSCRIPT OF PROCEEDINGS

(Motions Hearing)

Norfolk, Virginia
March 22, 2018

BEFORE: THE HONORABLE MARK S. DAVIS
United States District Judge

Appearances:

OFFICE OF THE UNITED STATES ATTORNEY
By: MELISSA O'BOYLE
ELIZABETH YUSI
KEVIN HUDSON
Counsel for the United States

ZOBY & BROCCOLETTI
By: JAMES O. BROCCOLETTI
- **and** -
LAW OFFICE OF JASON M. WANDNER
By: JASON M. WANDNER
Counsel for Defendant

The Defendant appearing in person.

P R O C E E D I N G S

(Proceedings commenced at 11:34 a.m. as follows:)

COURTROOM DEPUTY CLERK: In Case No. 2:17cr126, the United States of America v. Daryl G. Bank.

Ms. O'Boyle, is the government ready to proceed?

MS. O'BOYLE: The United States is ready. Good morning, Your Honor.

THE COURT: Good morning, Ms. O'Boyle. You have with you Mr. Hudson and Ms. Yusi?

MS. O'BOYLE: Yes.

MR. HUDSON: Yes, sir, good morning.

COURTROOM DEPUTY CLERK: Mr. Broccoletti, is the defendant ready to proceed?

MR. BROCCOLETTI: Good morning, Your Honor, present and ready. And may I introduce Mr. Jason Wandner from Florida who has been admitted *pro hac vice* to appear as co-counsel in this case.

THE COURT: All right. Good to have you, Mr. Wandner.

MR. WANDNER: Thank you, Judge.

THE COURT: All right. Well, we're here today for a hearing regarding Mr. Bank's pending motion for return of property and the first motion *in limine* also concerning victim impact evidence, as least as I understand what we've been, I've

asked you to prepare for.

I'm going to first hear argument on the motion for return of property, and then I'll hear argument on the motion *in limine*, and then of course we also have the motion to reconsider. So if time permits, I'll hear argument regarding Mr. Bank's motion to reconsider and motion to modify bond to permit sale of the family home, and I think Ms. Yusi may have written that.

MS. O'BOYLE: Your Honor, we were under the impression that the Court had referred those to Judge Leonard. We certainly will argue them if the Court would like to hear those today, but we did not prepare to present evidence relatable to those issues today.

THE COURT: Okay. Well, Madam Clerk, while I'm moving on. Will you determine whether they have been referred?

COURTROOM DEPUTY CLERK: Yes, sir.

THE COURT: Okay. Thank you.

So once I started getting into the issue of the pending motion for return of property, which was challenging, because I've been in this RICO murder trial for seven weeks, but once I started, you know, delving into it, a lot of questions arose, and so I'm going to try to sort of tell you where I think we are, or I am, and then give you the opportunity to comment on some of the issues that are outstanding.

So at the outset I note that the Court is of the view

that in the absence of the filing of a timely claim contesting the administrative forfeiture, the Court lacks jurisdiction to adjudicate the merits of the forfeiture, as our Court of Appeals observed in the Ibarra v. United States case in 1997. And where no valid claim has been timely filed, district courts, at least as I understand it, only retain limited jurisdiction to determine whether the seizing agency complied with the notice and other procedural requirements, as our Court of Appeals said in U.S. v. Minor in 2000. I understand the defendant to be arguing that the Supreme Court's Lewis decision in 2016 has somehow altered the procedural requirements for an administrative forfeiture, and consequently that this court retains limited jurisdiction to determine whether the administrative forfeiture complies with these new alleged procedural requirements. And so I'm primarily interested in determining what the status of the administrative forfeiture currently is, and then second, what defendant's precise argument is regarding how Lewis changed the procedural requirements for forfeitures.

Now, I have a series of questions, and I've thought about how I should handle this, and I think maybe it would be best to just get right to the questions before, because there's already been briefing on these issues, rather than just letting you all launch in some general kind of arguments. So who is going to be handling this for Mr. Bank?

MR. WANDNER: Jason Wandner, Judge.

THE COURT: All right. Come on up to the podium if you would, Mr. Wandner.

So the Court's understanding is that you have not filed a timely claim contesting the administrative forfeiture. Is that right?

MR. WANDNER: That's actually not correct, Judge. We did file a timely claim. We sent --

THE COURT: When was that?

MR. WANDNER: Within the prescribed time period in the notices. Mr. Broccoletti filed one on behalf of the defendant, and we filed one on behalf of Katrina Bank, his wife. Both were sent timely and set forth specifically the demand and claim on behalf of the cash proceeds that we are litigating today.

THE COURT: Okay. And.

MR. WANDNER: And we have copies of those, Judge.

THE COURT: You're conceding obviously, I would take it then, that the government met its notice requirements?

MR. WANDNER: Judge, they certainly put both parties on notice, and we have complied with it. And if the Court needs copies of those, I'm sure we can file those by the end of today.

THE COURT: So, and before I forget, the motion to reconsider was referred to Judge Leonard, but it was referred back to us. But I won't make you all argue that today, since you're not prepared, apparently.

(Court and courtroom deputy conferred.)

THE COURT: It's not formally reflected on the docket that was it was referred back, according to the clerk.

All right. So once -- so an administrative claim was filed, and once that has happened, what transpired regarding those claims at this point? Where are we procedurally?

MR. WANDNER: My understanding, Judge, is once the claimant or claimants in this case filed their claim, it is up to the government to then proceed with filing an actual complaint to -- which would start a litigation process, which has not, as far as we understand it, has not yet been started. We have not seen any kind of actual claim made. But that would be the, as far as I understand the law, there would be some sort of a separate claim, and also in federal court, but outside of the criminal case.

THE COURT: I think I'd better hear from Mr. Hudson, Mr. Wandner.

MR. WANDNER: Okay.

THE COURT: Thank you. You can go ahead and have a seat.

MR. HUDSON: Okay. So --

THE COURT: I guess I'm a little confused. I don't know how I missed -- was it in the pleading that the claim had been filed?

MR. HUDSON: So at the time that I filed my response,

I don't think a claim had a been filed. But I can confirm for the Court that indeed a claim has now been filed.

THE COURT: Was it timely?

MR. HUDSON: I believe it was timely, because FBI referred it, referred it to us, referred it to our office. And so what --

THE COURT: So you're supposed to file a complaint at that point, right?

MR. HUDSON: Not necessarily. That is one of three options. So under 18 U.S.C. 983(a)(3)(A), says "Not later than 90 days after a claim has been filed" the government essentially has one of three options. It can, (i), give the property back, (ii), initiate a civil forfeiture action, or (iii), include the property in a criminal forfeiture proceeding; that is to say, either file a Notice of Particulars saying that the property in question is included within the forfeiture allegation in the indictment, or in the alternative, seek a superseding indictment which names the property in the indictment. In this case we already have a forfeiture allegation in the indictment. The indictment is, as the Court is aware --

THE COURT: Hold on. Hold on.

MR. HUDSON: Yes, sir.

THE COURT: 983.

MR. HUDSON: Yes, sir.

THE COURT: (a).

MR. HUDSON: (a). It starts at (3)(A), which in the --

THE COURT: (a)(1) or (a) --

MR. HUDSON: (a)(3)(A), Your Honor.

THE COURT: Hold on.

MR. HUDSON: Yes, sir.

THE COURT: I have to be tracking with you.

MR. HUDSON: Yes, sir. Of course.

THE COURT: All right. So this has so many subparts.

MR. HUDSON: I know, Your Honor. It's not exactly the easiest statute to look at in the world, and it goes on for a couple pages.

So --

THE COURT: Hold on. I'm not there yet.

MR. HUDSON: Yes, sir. I'm sorry.

THE COURT: Are we using the same book?

MR. HUDSON: The Court has the blue one. I've got the green one.

THE COURT: Okay. Hold on.

MR. HUDSON: Oh, Ms. O'Boyle has the blue one.

THE COURT: My green one has disappeared.

MR. HUDSON: Your Honor, if the Court would give me a moment of indulgence, they did show where 983 is. So I'm looking on not the page where 983 begins, I guess that's Page 661. Page 662.

THE COURT: Okay.

MR. HUDSON: Over on the right column about halfway down is where it starts.

THE COURT: (3)(A).

MR. HUDSON: (3)(A). It actually goes into (B) as well because (B) talks about what happens if the government doesn't do one of these things before the 90 days.

THE COURT: And the three options are all in (A)?

MR. HUDSON: (A) only sets out the civil option. (B) also sets forth the criminal option.

THE COURT: So (A) is civil, (B) is the criminal option?

MR. HUDSON: Criminal, yes, sir.

THE COURT: Okay. So under (A), "Government shall file a complaint for forfeiture in the manner set forth in the supplemental rules for certain admiralty and maritime claims, or return the property pending the filing of a complaint, except that a court in the district to which the complaint may be filed may extend the period for filing a complaint for good cause shown or upon agreement of parties."

(B). If the government does not file a complaint for forfeiture or return the property in accordance with subparagraph (A), or before the time for filing a complaint has expired, obtain a criminal indictment containing an allegation that property is subject to forfeiture and takes step necessary

to preserve its right to maintain custody of the property as provided in the criminal forfeiture statute, the government shall promptly release the property.

You're contending you're proceeding under which one?

MR. HUDSON: We're proceeding under the criminal one, Your Honor, under (B).

I can also let the Court know, I should have said this earlier, (C), just beneath (B), provides that "In lieu of or in addition to filing a civil forfeiture complaint, the government may include a forfeiture allegation in a criminal indictment." Now certainly we've done that. We've done that right at this point. And in terms of at least going to subpart (B), that would involve either obtaining a superseding indictment or filing a notice of particulars stating that the property is included in the forfeiture allegation in the indictment.

THE COURT: Okay. So your view of what we're doing is proceeding under 3(B) --

MR. HUDSON: And (C), yes, sir.

THE COURT: -- (i)...

MR. HUDSON: (3)(B)(ii)(I), yes, sir.

THE COURT: (3(B(i) or lower case (ii).

MR. HUDSON: Two -- yeah, lower case (ii), excuse me sir. Lower case (ii) and then capital I or capital Roman numeral I.

THE COURT: Then under (C)...

MR. HUDSON: Yes, sir.

THE COURT: We're proceeding under C in your view?

MR. HUDSON: Yes, sir.

THE COURT: Okay.

MR. HUDSON: And so in that instance, Your Honor, whether the defendant has the right to the return of the property pretrial is governed by United States v. Farmer and the cases flowing from United States v. Farmer. And so --

THE COURT: And you view what the defendant has done is essentially filing a Monsanto or Farmer request?

MR. HUDSON: Yes, sir, that's right. But without actually mentioning either of those cases. And so I don't know how much the Court wants to hear from me on this particular point, but I would submit to the Court they haven't even made the threshold showings they need to make under Farmer, the Farmer line of cases that would entitle them to any kind of relief that would entitle them to have the government put on any kind of evidence. They filed just the two-page motion. I can go into more detail if the Court would like.

THE COURT: Well, yeah, I think you should.

MR. HUDSON: Yes, sir. Of course. So I'll let the Court know we are prepared to put on evidence today, but that doesn't change the fact that Farmer is a two-step process with a shifting burden of proof, as the government set out in its response brief on this motion.

Now, the defense has filed a two-page motion, as I mentioned. It doesn't even mention Farmer. And it's a motion that makes no serious attempt to satisfy either of Farmer's threshold requirements. As the Court is aware, the threshold requirements under Farmer are twofold: No. 1, that the defendant lacks other funds with which to retain counsel of choice, and two, that probable cause is lacking; that the asset in question here, the $77,000, would be subject to forfeiture. Those are the threshold requirements on which the defendant has the burden before the government has any further burden. And I say further burden because the government has already made a probable cause showing, actually two of them, before we have even gotten to this point.

THE COURT: So is it your view that there was a probable cause showing that was made in the warrant that was issued in Florida that didn't identify particular funds, but just covered the seizure, search and seizure warrant covered money? So is it your view that's one?

MR. HUDSON: That is one of the two, Your Honor.

THE COURT: And is the second one the issuance here specifically by the magistrate judge?

MR. HUDSON: That's correct, Your Honor. So we have gotten two magistrate judges to pass on this issue: One before the seizure occurred, and of course factually it would have been impossible for the government to get a seizure warrant for this

cash prior to executing the search warrant, it's just the nature of the fact scenario that we have here. There may be an idea that there may be some cash in the house, but it would be, it would be a rarity that agents would know prior to executing a search warrant precisely how much cash they're going to find in a house. Therefore, I would submit to the Court that the affidavit and the warrant that issued in the Southern District of Florida got as specific as it could possibly get. And again, after the, after the seizure occurred, we got a second opinion from Judge Leonard here in the Eastern District of Virginia, and he also issued a seizure warrant. So...

THE COURT: Where he found probable cause.

MR. HUDSON: Correct, sir.

THE COURT: Based on specific evidence presented to him, he found that there was probable cause that the $77,000 and change was the result of criminal activity --

MR. HUDSON: Yes, sir.

THE COURT: -- by the defendant?

MR. HUDSON: Correct, sir. Yes.

THE COURT: And so did you get that second warrant because you thought you needed to or out of an abundance of caution --

MR. HUDSON: The latter.

THE COURT: -- what's your view?

MR. HUDSON: The latter, Your Honor. Especially in

light of the filing of the motion on the $77,000 it was out of an abundance of caution that we got a second opinion. I don't think we would need to, because the, as I explained a moment ago, the warrant that issued in the Southern District of Florida got as specific as it possibly could based on what was known at the time. I mean, Item No. 1 in the Attachment B to the search warrant was cash found at the address. And so they were authorized to seize the cash found at the address. And I think the reasons offered in the warrant were, one, fruits of the crime, and two, evidence of the crime. And the magistrate judge in the Southern District of Florida found probable cause to that effect. The affidavit that was attached as an exhibit to the government's response brief goes into a good deal of detail about the financial investigation in the case, at least based on the records we had to that point. And it also, I would submit, demonstrated that the fraud was continuing. It discussed the Oculina Bank study that went into 2017. It certainly showed that the fraud was continuing, and it demonstrated that the lion's share of the defendant's money was coming from this fraud scheme. And --

THE COURT: So you know, you've --

MR. HUDSON: Yes, sir.

THE COURT: This is what you do, mostly, I think, in our district is what you handle, and it's a somewhat, I think you could say an arcane area of the law that we're not dealing

with every day. You know, I can't very -- in nine-plus years, I don't know, I've had a couple of these issues come up like this. I'm going to probe a lot.

MR. HUDSON: Yes, sir that's fine.

THE COURT: The defendant essentially has argued that in 2016 the Supreme Court changed the landscape in that there was concern about, at that time, the government seizing untainted assets pretrial, essentially coming in and freezing money when no trial had taken place, all you had was the charge, the accusation, the indictment, seizing money, and essentially keeping a defendant from being able to use that money to hire his own attorney, as he had a Sixth Amendment right to do. And the Luis case dealt with a different statute than what we are dealing with here, but in a, I guess that was a plurality, was it a plurality opinion? It was a close opinion nonetheless, the Court said you can't, you cannot seize untainted funds. And again, I don't claim to be any expert on this at this point, and you all are helping me work through this, but two of the justices, Justice Breyer and Justice Alito, were concerned that in their concurrence I think they were concerned that money is tangible -- is fungible, excuse me, is fungible, so it's hard to distinguish in some circumstances between tainted and untainted. And what do you understand the defendant's argument -- although that was a different statute, what do you understand the defendant's argument to be here under the statutes we're dealing

with?

MR. HUDSON: I understand the defendant's arguments to be twofold. First, best as I can gather from the motion that was filed, there seems to be a suggestion in there, though it is not explicitly stated, that somehow Luis and Chamberlain, a Fourth Circuit case that came out just very recently this year, somehow overruled the Farmer line of cases. I also take them --

THE COURT: Can you stay right up there at the podium for me, because we have a new system and the microphone is up there in front of you. Thank you.

MR. HUDSON: Yes, sir.

UNIDENTIFIED SPEAKER: Can't hear back here either.

THE COURT: Okay. We have many people in the gallery, and it sounds like they're having trouble hearing you too. The acoustics in the courtroom aren't the best, perhaps. But if you'll stay right there, we'll see.

MR. HUDSON: Of course, sir.

And so that is the first argument that, at least best as I can gather, they are making that somehow Luis and Chamberlain, the Fourth Circuit case that came out earlier this year, somehow overruled the Farmer line of cases. That's part one.

Part two I take them to be saying --

THE COURT: Overruled it. Let's deal with that while it's --

MR. HUDSON: Yes, sir, of course.

THE COURT: Overruled it how?

MR. HUDSON: I suppose overruled the threshold requirements that they have to meet in order to, one get a hearing in the first place, and two, to get the government to present any further evidence aside from the affidavits it has already submitted to two magistrate judges.

THE COURT: That's interesting. So how -- the two requirements in order to cause a court to have a hearing on the seizure are that the defendant show he lacks funds to retain counsel and that the government lacks probable cause to seize the property --

MR. HUDSON: Yes, sir, that's correct.

THE COURT: -- right? And you think that they may be arguing that Luis and Chamberlain somehow modified those requirements. What do you understand their argument to be as to why or how it modified it?

MR. HUDSON: Well, again, as best as I can gather from the two-page motion that was filed, I take them to be saying that they don't need to mention Farmer, don't need to satisfy Farmer, all they have to do -- essentially I take them to be saying they have an automatic right to a hearing on this question. And Farmer does not say that. But I mean, I certainly -- if that is what they're saying, I have -- I most certainly have something to say to that.

And there's a second component to what I think they're saying as well. I don't know if the Court wants me to go into that or stick with this first point.

THE COURT: No, I think you can go on.

MR. HUDSON: Yes, sir. So the second point that it appears they're making is that because cash is fungible and you can't trace cash, essentially -- I know they might be saying you can't seize cash in this case, but I don't know how you could distinguish this from any other case -- I mean, it essentially seems they're saying you can't seize cash, you just can't seize cash because, you know, 99 percent of the time you're not going to be able to trace cash because cash is a fungible thing. Cash does not leave an electronic or paper trail in the same way that bank accounts do. I have something to say to that too.

THE COURT: Okay.

MR. HUDSON: Would the Court like me to respond to that point?

THE COURT: Yes.

MR. HUDSON: All right. So Your Honor, the affidavits in support of the search warrant, or the one search warrant, the seizure warrant that was issued in this case, both show that the vast majority of the defendant's money, at least from 2012 to 2015, came from the fraudulent activity in the indictment. And the affidavits also demonstrated that the fraud continued into 2017, 2017 being the time when the cash was seized. We have --

now, this portion is not included in the affidavits, but we have since gotten financial records from 2016 and 2017, and I can tell the Court they show nothing different. But where we know that the majority of someone's money is coming from unlawful activity, and the bar is as low as probable cause, and the Supreme Court has acknowledged in this very context in the Kaley case that from 2014 that probable cause is a fairly low bar. And so where we know the vast majority of money's coming from an unlawful activity, here fraud, then going right up to the time of the seizure, then it stands to reason -- I mean, at least to a probable cause standard, that cash seized would constitute proceeds of that unlawful activity.

To give maybe a more common example, no, I don't think anyone questions for a moment when we know that someone's been selling drugs for the last couple years and the police go into the person's house and there's cash there in the house, a significant amount of cash, no one -- or it's quite uncommon for anyone to question that that money constitutes drug proceeds. Now, why is that? It's because we know that's where the lion's share of the person's money came from. I understand drugs are a cash business and fraud is generally not a cash business, but I would submit to the Court that that's a distinction without a difference in this case where we know that the vast majority of the defendant's money in the years in question came from a certain illegal activity. So here, fraud.

One of the cases the government cited in its response brief to the defendant's motion, Melrose East, a Fifth Circuit case, that court kind of makes this point. They say in a proceeds case, the government need not discount the possibility that some legitimate funds are commingled with the restrained property, nor need it trace the restrained funds to specific offenses. It is enough to show that there was pervasive fraud in the defendant's businesses and that the defendant acquired the funds during the time that the scheme was underway."

THE COURT: That case is -- say the name of that one?

MR. HUDSON: It is Melrose East, Your Honor. And the portion of it --

THE COURT: From? Which court?

MR. HUDSON: I'm sorry, sir. The Fifth Circuit.

THE COURT: And that's what year?

MR. HUDSON: The -- oh.

THE COURT: Is it after Luis?

MR. HUDSON: Not after Luis, no, sir.

THE COURT: Okay.

MR. HUDSON: But I do have some post Luis cases. Luis came out fairly recently, so there are only so many post Luis cases. I do have some post Luis cases.

THE COURT: Have any of them dealt with this exact issue that we have here?

MR. HUDSON: They have dealt with the burden issue,

not necessarily the issue -- when I say the "burden issue", I mentioned the defendant's threshold burdens under Farmer and the analogous cases before the government has, before the onus is on the government to do anything further. They have dealt with that issue. They have not dealt with the cash being fungible issue.

THE COURT: So --

MR. HUDSON: Yes, sir.

THE COURT: -- so on that first issue, pre-Luis, the Jones/Farmer line of cases required that in order to get a hearing to challenge the seizure of the property, that a defendant had to show that he lacked funds to retain counsel?

MR. HUDSON: Yes, sir.

THE COURT: And you're saying several courts have already said that Luis did not do away with the requirement for such a showing?

MR. HUDSON: Yes, sir. And I can point the Court --

THE COURT: What are those?

MR. HUDSON: Yes, sir. I can point the Court to a couple cases. One cited in the government's response brief, United States v. Jones, this is a Seventh Circuit case from 2016. I can give the Court the cite if it will be helpful. It's 844 F.3d 636, looking particularly at Pages 640 through 641 as well as Footnote 1 in that case.

The gist of what the --

THE COURT: And the other?

MR. HUDSON: Oh, yes, sir. Is United States v. Stokes. That is a case out of the Northern District of Georgia. The cite on that, I don't -- this one made it into the government's response brief, so the cite on that is 2017 Westlaw 5986231 looking around Page 5 of that opinion.

THE COURT: Okay. And the Seventh Circuit case is what year?

MR. HUDSON: It's 2016. And the Georgia case, the Northern District of Georgia case I just gave the Court was issued October the 23rd, 2017.

THE COURT: And they both say that Luis did not change the requirement that a defendant must show, in order to get a Farmer hearing, that he lacks funds to retain counsel?

MR. HUDSON: That's correct, Your Honor. Yes.

THE COURT: Okay.

Can I stop you for a second? I think I may have a issue that I need to deal with.

MR. HUDSON: Of course, sir.

(Court and courtroom deputy conferred.)

THE COURT: What I need to do is I have a, there are a lot of people here sitting in the courtroom that I assume are people who are interested in your case. As I said, I just concluded the evidence in a trial and I have a jury back here deliberating in this criminal trial, and they have a question,

and I have all the attorneys now in the courtroom in that case. And I don't want to hold them up in their deliberations. And so I hate to ask you all to do this, but I think we need to take a recess in this matter and ask you all -- I don't think you need to move your things off the table, you're welcome to leave your things on the tables, but at least it'll free up all those chairs for all the attorneys in my other case, they can come up and we'll deal with that, and if you'll stay close. Because I hope this won't take long. Thank you.

So, do you know what? I just, I forgot something. We're going to be having to bring all these defendants in. So I am concerned about things being on the table. You can go ahead and have our defendant, Mr. Bank out. But on the defense side, I think you need to move your things.

I'll leave the bench so we can get the defendants assembled also.

(Recess taken from 12:10 p.m. to 12:30 p.m.)

THE COURT: Okay. Where were we, Mr. Hudson?

MR. HUDSON: Yes, sir.

THE COURT: So you were telling me about these two cases, Jones and Stokes. And I've looked at Jones quickly. And I do see in the footnote that they do address -- the Seventh Circuit did address the threshold showing and say you still have to show, after Luis, the defendant still has to show he lacks funds to retain counsel. All right.

MR. HUDSON: And so I also mention the Stokes case that the Court just referenced as well from the Northern District of Georgia. And there, that court held the fact that the restraint of untainted assets --

THE COURT: Let's see. That was Star 5?

MR. HUDSON: Star 5, that's correct.

THE COURT: Let me find Star 5.

MR. HUDSON: Yes, sir.

THE COURT: Okay. So Star 5 on my Westlaw starts with a footnote or an indented quote. Where are we? Where do you go?

MR. HUDSON: So Your Honor, I'm sorry to say I don't actually have a copy of the opinion in front of me, but I do know that on page Star 5 there it says "Luis does not change the general rule" -- and I'm quoting from it here -- "it does not change the general rule that, to be entitled a hearing to determine whether assets are tainted, the defendant must make a *prima facie* showing of substantial financial need for those assets." And I have cases beyond those two whenever the Court is ready for them.

THE COURT: Okay. So that's the first issue. And then on the second issue -- we'll wait and see if we need additional cases -- but you don't have anything from our circuit?

MR. HUDSON: I actually do. That's the next one I was

going to get to. And it doesn't mention -- part of the reason I didn't mention it first is it doesn't mention Luis specifically, but it does post-date Luis. This is United States v. Johnson, 683 F. App'x 241. This is at Page 49 in particular, from the Fourth Circuit, 2017. And a quote from that case is "The record also demonstrates that Johnson failed to make a *prima facie* showing that her assets were untainted, so she is not entitled to a hearing under Farmer. Not even entitled to a hearing, much less any relief under Farmer.

And then the other case I have on point I put in the government's response brief, and that's the Hernandez-Gonzalez case from the Southern District of Florida. I don't know if the Court would like me to give the cite for that now or would like me to wait?

THE COURT: Go ahead.

MR. HUDSON: Yes, sir. That's 2017 Westlaw 2954676 at page Star 7. They discuss Luis at length in that case. And the Court there actually says that the defendant was not entitled to a hearing to challenge the probable cause that certain assets were proceeds where the defendant had not provided "complete financial disclosure to include his assets, liabilities, sources of income, net worth, whether he has access to financial records, and the expected costs of his defense team.

The opinion I'm reading from was the report and recommendation of the magistrate judge. It was adopted by the

district court. I can give the Court the cite for the adoption on it.

THE COURT: Hmm-hmm.

MR. HUDSON: 2017 Westlaw 3446815 adopted by the district court in August of 2017.

THE COURT: Okay. So then on the second issue, you were going to address that too?

MR. HUDSON: The second issue being?

THE COURT: Well --

MR. HUDSON: The cash?

THE COURT: The government lacks probable cause to seize property.

MR. HUDSON: That we lack probable cause?

Your Honor, in this case I'm --

THE COURT: In other words, do you construe his argument to be that Luis did away with the threshold requirement that not only he lacks funds to retain counsel, but also that a threshold showing by him that the government lacked probable cause to seize the property?

MR. HUDSON: Yes, Your Honor. I take what he is saying to mean that he has the right to an automatic hearing if he asks for one with respect to the, with respect to the probable cause for the assets in question. And I think the cases to which I have just cited the Court say the opposite. And there are reasons for the threshold requirements that Farmer

has put in place. Part of the reason for the threshold burden is that when the defense gets access to and the ability to cross-examine government witnesses at an earlier stage in the case like this, they're getting access to discovery to which they would not otherwise be entitled under the Constitution or the criminal rules. The Supreme Court discussed this problem in Kaley. The Fifth Circuit alluded to it in Melrose East. And one of the district court cases, Melrose case I cited in my response, came right out and said it. That's the Simpson case that's on Page 5 of my response brief.

But I don't know if the Court has further questions or would like me to go on?

THE COURT: No. I think we had better hear from defense at this point. But I have to -- I am curious, did you think that I knew that an administrative claim had been filed? Was there some way that you thought that was before the Court or that I was going to intuit that?

MR. HUDSON: I, I don't, I don't know, Your Honor. I know they mentioned administrative forfeiture. I said something about it in my response brief. I can tell the Court I have information about that. The during the break I found out that the claim that was -- there were two claims filed on the property in question. I'll just tell the Court what the earliest one was. The earliest one was January 24th of this year. So we're now -- what's today, the 22nd? We're just

before about day 60. And as I explained under 18 U.S.C. 983, the government has 90 days to do something, file a civil suit, put it in an indictment, give it back. And I can share with the Court, I wasn't sure before when I was standing up here whether I could share this but I'm told I can share with the Court, April 19th we intend to supersede and we'll be putting this property and more in the superseding indictment.

THE COURT: And that's within the 90 days?

MR. HUDSON: It will -- yes, sir, that would be within the 90 days. Let's see, January 24th. I guess approximately April 24th. Maybe a little later. Because February only has 28 days. But thereabouts. It would be maybe the 24th, 26th of April, somewhere around then I think would be our 90-day deadline, and we intend to supersede at the April 19th sitting of the Grand Jury.

THE COURT: So is your view that even if the defendant was entitled to some challenge, that it would be premature to do it before then?

MR. HUDSON: There have been cases where courts have considered Farmer motions based on a seizure warrant, not based on a Grand Jury's finding. And so based on those cases, I'm not sure it would necessarily be premature. But on the administrative side of things, the government is certainly complying with its timing requirements there. We are going to supersede before the 90 days and we will be naming this asset

there in the indictment.

THE COURT: And that would be under 983...

MR. HUDSON: Yes, sir. So in the government's view, we have already complied with 983(a)(3)(C) which says "In lieu of or in addition to filing a civil forfeiture complaint, the government may include a forfeiture allegation in a criminal indictment." Well, we've already got a criminal indictment that contains a general forfeiture allegation along with some property, just not the property that we found after the indictment was issued. It wouldn't have been possible to put that in the present indictment. Once we obtain a superseding indictment, not only will we have complied with that provision, we will have also complied with 983(a)(B) --

THE COURT: (a)(3)? Oh, yes. (a)(3)(B)?

MR. HUDSON: (a)(3)(B)(ii)(I).

THE COURT: Okay. By obtaining a criminal indictment containing an allegation that the property is subject to forfeiture. But you take the position you have already complied with (a)(3)(C)?

MR. HUDSON: Yes, sir. That's correct.

THE COURT: Because you did what?

MR. HUDSON: Because there is a general forfeiture allegation in the indictment. It does include specific property, just not this -- just not --

THE COURT: A general civil forfeiture allegation?

MR. HUDSON: No, sir. Sorry. A general criminal forfeiture allegation. Only a criminal forfeiture allegation can go in an indictment.

THE COURT: Where is that in that subsection?

MR. HUDSON: So the way it reads, "In lieu of or in addition to" -- this would be of course in lieu of -- "filing a civil forfeiture complaint, the government may include a forfeiture allegation in a criminal indictment." Well, we've got a criminal indictment with a forfeiture allegation. It doesn't say "naming the specific asset." So that's why I would urge the Court in the alternative that if at this moment we have complied with (a)(3)(C), but even if the Court disagrees on that front, we will certainly within the 90-day period have complied with (a)(3)(B)(ii)(I) as I described to the Court earlier.

THE COURT: Where does the warrant issued by the magistrate judge here come into play?

MR. HUDSON: It is --

THE COURT: Or does it? In this scheme?

MR. HUDSON: Well, in this scheme of things it is another probable cause determination. And it would be -- I suppose you could view it as the government perfecting its right to retain the property for criminal forfeiture because the seizure warrant obtained from Judge Leonard here, if I'm recalling correctly, contained both the civil forfeiture provision for the funds in question as well as the criminal

forfeiture provision for the funds in question. So it authorized seizure under both. Or its retaining --

THE COURT: You're saying that under (a)(3)(C) that --

MR. HUDSON: No, sir. It does say -- so it does say if we go -- well, actually, I'm sorry, sir, I didn't mean to cut the Court off.

THE COURT: So you're saying that under (a)(3)(C) --

MR. HUDSON: Yes, sir.

THE COURT: -- there is a forfeiture allegation, a general forfeiture allegation in the existing criminal indictment?

MR. HUDSON: Correct.

THE COURT: So you view that as being sufficient right now. But you also view the warrant issued by the magistrate judge here to be a, to put a finer point on that forfeiture allegation in your existing indictment?

MR. HUDSON: Yes, sir. And so going to the second sentence of (a)(3)(C), it says "If criminal forfeiture is the only forfeiture proceeding commenced by the government, the government's right to continued possession of the property shall be governed by the applicable criminal forfeiture statute." I suppose obtaining the seizure warrant -- without conceding that it would have been necessary to get the second seizure warrant, because I don't think it would have, it was seized pursuant to a search warrant that said that cash could be seized as fruits of

the crime as well as evidence of the crime -- but I suppose it could be viewed as an extra-cautious step to perfect the government's right to retain the funds.

THE COURT: Under that second, under that second sentence?

MR. HUDSON: Yes, sir.

THE COURT: So that second sentence of (C): "If criminal forfeiture is the only forfeiture proceeding commenced by the government." Is that the case?

MR. HUDSON: It is going to be the case here, Your Honor.

THE COURT: But right now?

MR. HUDSON: Right now under (C), yes, all -- we do not have a civil forfeiture -- civil judicial forfeiture case pending. The administrative forfeiture which has now been cut off by the filing of the claim, administrative forfeiture is a version of civil forfeiture. It's just non-judicial civil for the --

THE COURT: So what we have right now is an indictment with criminal forfeiture claim in it or --

MR. HUDSON: An allegation, yes, sir.

THE COURT: Allegation.

MR. HUDSON: At the end.

THE COURT: If criminal forfeiture is the only proceeding commenced by the government. We have an

administrative forfeiture proceeding?

MR. HUDSON: Well, it was actually cut off when they filed the claim.

THE COURT: I see.

MR. HUDSON: When a valid claim is filed, the administrative forfeiture proceeding stops straight away and is referred for judicial forfeiture.

THE COURT: So you're saying that kicks in, that provision kicks in, and therefore the government's right to continued possession of the property will be governed by the applicable criminal forfeiture statute, and then from there, you're saying that the applicable criminal forfeiture statute is what and provides what?

MR. HUDSON: Oh. So the applicable criminal forfeiture statute in this case is going to be 18 U.S.C. 981(a)(1)(C). That is a civil forfeiture provision; however, it is applicable in criminal cases through the operation of 28 U.S.C. 2461(c).

THE COURT: And what does, what do those provisions have to say to the -- how do they support your argument that the warrant issued by the magistrate judge here perfected, acted to sort of perfect your forfeiture allegation in the existing criminal indictment?

MR. HUDSON: Because, Your Honor, one of the ways that the government can seize property for criminal forfeiture is

through a seizure warrant. Now, how does that come into play with the statutes that I have just referenced? So this requires me to reference another statute. The second statute that I referenced, 28 U.S.C. 2461(c) provides that the procedures set forth in 21 U.S.C. 853" -- I think it's except for subsection C, except for subsection C I think it is -- "apply to criminal forfeiture proceedings." And so what does 21 U.S.C. 853 have to say about this? 28 U.S.C. 853(f) is the provision that allows for the issuance of a criminal seizure warrant. And so the government got that. And so I'm saying that that helped perfect the government's retention of the property for criminal forfeiture. I'm not sure that would have been necessary here, again, in light of the fact that we had the search and seizure warrant from the Southern District of Florida to begin with which authorized the seizure of cash at the location, both as fruits of the crime and as evidence of it. And really I guess my point is this: The government's obtaining of a second seizure warrant here was more of a precautionary measure than anything else. I am not saying it was necessary.

THE COURT: But even having the warrant out of Florida, I mean, it looks like you already have (a)(3)(C).

MR. HUDSON: Yes, sir --

THE COURT: -- as a basis.

MR. HUDSON: Yes, sir.

THE COURT: So what does the warrant out of Florida do

for you? Where does that in this scheme provide you with the freedom to keep that, to hold that money?

MR. HUDSON: It allowed us to seize it in the first place. And so now that we --

THE COURT: Where? Show me that. Where does it say that?

MR. HUDSON: Well, it's not there in that statute, but a search and seizure warrant does allow for property to be searched and also to be seized where it fits into certain categories, and those categories the magistrate judge in Florida found were satisfied as to evidence and fruits of the crime. And so that allowed the government to seize it in the first place.

THE COURT: And had the beneficial effect, you're saying, of, after the criminal indictment was filed, sort of perfecting what was done in the criminal indictment on the forfeiture issue?

MR. HUDSON: The indictment under 983(a)(3)(C), I would submit at this point, allows us to retain those funds for criminal forfeiture. And if there were any doubt about that, certainly Judge Leonard's seizure warrant here, which names the criminal forfeiture authority as well as the civil forfeiture authority, would allow us to hang on to that property. It authorizes the seizure, and by implication the continued retention of that property for criminal forfeiture. And

proceedings have begun to forfeit that property criminally, both through the forfeiture allegation that exists at present and it will be even -- that forfeiture allegation will be specific as to this $77,000 once we obtain a superseding indictment, I anticipate, subject to the Grand Jury's probable cause finding.

THE COURT: If the defendant were correct that he did not need, after Luis, to satisfy each or both of these requirements, then normally the government would have to come forward at the hearing and show that the property is forfeitable, and where you have an indictment already, you don't have to -- do you have to -- you don't have to show that the defendant committed the charged offense, do you?

MR. HUDSON: In fact, Your Honor, there was a Supreme Court case about that back in 2014, I think. The case is Kaley -- I don't know whether it's Kaley v. United States or United States v. Kaley, but it's from the -- I have it here somewhere.

THE COURT: 134 S.Ct. 1090.

MR. HUDSON: Yes, sir. That holding in Kaley was that defendants are not entitled to challenge the Grand Jury's probable cause determination as to the crimes alleged in the indictment at a pretrial, post-restraint, i.e., Farmer, hearing. They cannot challenge the Grand Jury's finding that they committed the offenses set forth in the indictment; rather, the challenge is limited only to the nexus between the offense and

the property in question.

THE COURT: That is, that it is forfeitable?

MR. HUDSON: Correct. Yes, sir. That is only issue in a Farmer hearing under Kaley. You cannot revisit the Grand Jury's probable cause determination with respect to the offenses set forth in there. And the Kaley court kind of explains that, you know, this would cause quite, quite an issue if a court were able to preside over a trial based on the Grand Jury's probable cause determination where the court had decided that that probable cause determination as to the offenses charged was in error. Basically the Grand Jury gets the final say on that and that's good enough. Yes, sir.

THE COURT: Okay. Thank you, Mr. Hudson.

MR. WANDNER: I don't know if anyone else's head is spinning, but mine sure is.

THE COURT: Well, I did ask Mr. Hudson, to be fair, to prognosticate a little bit about how he interpreted your filing.

MR. WANDNER: Yes, Judge.

THE COURT: Do you want to tell me how you interpret it or what you intended it?

MR. WANDNER: Judge, certainly lot going on here, Judge. Judge, sounds like to me the bottom line is -- and even in Jones, the case that they cite, the Jones court, while it did make some *dicta* that the Luis court may or may not have been expanded, that was a plain error analysis because the defendant

never asked for a hearing and the Court never conducted an evidentiary hearing. It sounds like to me that this court needs to conduct an evidentiary hearing to go over the issue of the nexus. We make a claim in our motion for return of property, and to some degree, whether or not Farmer was overruled, because I don't necessarily think we need to get to that point, we've clearly made a claim in our second paragraph in our motion for return of property that it is the position of the defendant that pursuant to Luis and U.S. v. Chamberlain, that those funds we're specifically talking about, the 77,000 in cash, cannot be linked to any of the offenses alleged in the indictment and are needed for attorney's fees and costs associated with the defense of this case. And I can tell the Court if any argument or representations need to be made in this record, we desperately need same. The United States has a team of three attorneys and there's about six people in the front row all dedicated to this case. And while Mr. Bank has been able to retain Mr. Broccoletti and I, we do not have one dollar for experts. This is a case that experts are absolutely necessary. We do not have money to transport defense witnesses from all over the country that we anticipate needing. There are depositions from various civil cases that we cannot transcribe. So there is a desperate need on our end of the ledger for monies. And if that motion doesn't speak clearly enough, the other motions that we have filed regarding the property and what-not clearly state the

desperate financial state. As the Court I'm sure knows, their home has been restrained, properties that they own have been restrained, every dollar that was in any bank account has been restrained. There is absolutely not a single additional dollar that can be used for costs in relation to the case. So clearly our Paragraph 2 of our motion, to the extent that their argument is that Farmer needs to be satisfied, has clearly been satisfied, and if there's some evidence that the Court --

THE COURT: On the first, you're saying on factor one?

MR. WANDNER: Correct.

THE COURT: That is, you have to make a threshold showing to get a Farmer hearing that you lack funds to retain counsel. And are you appointed or are you retained?

MR. WANDNER: No, Judge, it's not to retain counsel. It's for defense-related costs. Also part of the inquiry. It's not just retention of counsel, it's also defense-related costs such as experts in this case. Clearly a forensic accountant would be necessary. Again, costs related to bringing witnesses. All those costs are part of the defense. And those -- clearly we will make the, we'll be able to make the requisite showing, not arguing that we need to make that finding because we do believe Luis has changed that landscape --

THE COURT: Do you have any case that says that?

MR. WANDNER: That the costs --

THE COURT: No. Do you have any case that says Luis

changed the landscape such that now you do not have to make such a threshold showing?

MR. WANDNER: I don't, Judge. The Jones case of course talked about it and it didn't -- it didn't say it one way or the other. They acknowledge that the defendant was making that argument and they state Jones may read Luis too expansively. Luis says nothing about timing or burden-shifting, but then they go on --

THE COURT: Well, what about the footnote?

MR. WANDNER: If you look at Headnotes 3 and 4 within the body of the case, Page 640.

THE COURT: A headnote?

MR. WANDNER: Not the headnote but... numbers three and four.

THE COURT: Yes. I'm with you.

MR. WANDNER: "Jones may read Luis too expansively. Luis says nothing about timing or burden-shifting. But even assuming without deciding that Jones' interpretation of Luis is correct, that case would have offered Jones at best an additional line of attack on the district court's restraining order." And what it goes on to say is "If the district court finds the defendant has insufficient alternative assets with which to pay counsel but the government fails to justify its retention of all the frozen assets, then the court must order the release of the funds in the amount necessary to pay

reasonable attorney's fees for counsel of sufficient skill."

It goes on to say that he never made that request. And that's why under plain error he received no relief.

If you go on to Page 642. In that case the defendant had significant other assets, some of which had been restrained but then those restraints were released and ultimately he had assets, so that wasn't an issue. And he never asked for an evidentiary hearing or hearing of any kind.

Here, we're clearly asking for a hearing. It seems clear from Jones that a hearing is necessary should the defendant have asked for it. We're certainly asking for it. And even under the argument counsel just made regarding Kaley, while we may not be able to challenge the probable cause analysis regarding the underlying crimes charged, we certainly have the right to challenge the nexus.

And the interesting thing, Judge, about the nexus is not only is -- I mean, they say that they have complied with 983. They haven't returned the property, there is no civil complaint, and they have not included this cash in the indictment. All of this has been a response to the filing of our motion for return of property. So while they say they intend to supersede, they haven't yet done so, and we clearly have the right to argue the lack of nexus and lack of probable cause. And in fact in the affidavits that support both the indictment and the -- excuse me, their response, the only cash

that's discussed is discussed having been withdrawn from an account back in, before 2015. 2013 to 2015. Nothing in the past two years from the date of 2015. And remember, their -- the time frame of their allegations of the criminal conduct was basically up to 2015. There are some arguments that some representations were made later on. But in terms of tracing of money, they have absolutely no proof that any of the cash sitting in 2017 at Mr. Bank's home that was seized is traceable to any of these transactions. And as a matter of fact, at the PTD hearing I examined the special agent, one of the special agents, and I believe -- the transcript is part of the record -- I believe I asked him "Do you have any proof that the cash found at the house is traceable to any of the illegal transactions or allegedly illegal transactions?" And my recollection of his answer was, "No".

So whether or not they claim that there was illegal transactions or whether or not there's probable cause for this indictment to go forward, the fact of the matter is they have no evidence that the cash found in his house was traceable to an illegal conduct. And that's exactly what Luis was talking about. It even discussed Justice Kennedy's --

THE COURT: But that was concededly untainted property.

MR. WANDNER: Well, then that's the issue. If Luis is only saying -- if Luis is limited to those situations where the

parties both concede it's untainted, then I think we're restricting Luis to a very great degree. I think Luis --

THE COURT: There's a plurality decision with significant concerns reflecting concurring opinions. I think you need to be extremely careful about how far you read Luis.

MR. WANDNER: I understand, Judge. But I don't think any of the one or two cases that are out there subsequent to Luis preclude our ability to obtain an evidentiary hearing to prove the lack of nexus. Because if they just make an allegation in order to restrain what we argue is untainted assets, then they can basically get around what Luis says they can't do, which is restrain untainted assets. Your Honor, since they have not filed a civil complaint, they're clearly placing these funds in Your Honor's jurisdiction. Your Honor has the right, the jurisdiction and the discretion and obligation under Luis to conduct a hearing to determine whether or not they have proven a nexus between the funds that we're claiming are untainted and the funds that they're claiming are not.

THE COURT: Any other judge ever say that since Luis?

MR. WANDNER: I can't say one way or the other, Judge. This is the first time I'm arguing these issues. But I think Jones, again, they brought up Jones, I'm glad they did, we ran upstairs, got a copy of it. It clearly states why didn't he ask for a hearing? Why didn't he object? Those assets were -- it seems to me from a reading of Jones --

THE COURT: Well, wait. Comes right at the end of the U.S. v. Moya Gomez citation that you just read to the end of. Their explanation. "As explained below, Jones has not shown a *bona fide* need for the restrained assets, thus, as in Phillips this case presents an inadequate vehicle by which to consider the issue." I read that as a threshold showing requirement. Am I missing something?

MR. WANDNER: Even if that's the case, we have complied with that in our motion for return of property where we make the statement that funds are not linked to a criminal offense and the funds are needed for attorney's fees and costs. I don't see where there's any other -- assuming we still have that burden, without giving up on that argument -- assuming we still have that burden, we have passed that threshold by making that statement in our motion. And again, I can, at an evidentiary hearing, we will certainly present sworn testimony on the need for the costs and the need for the money to be returned, assuming the Court finds them to be untainted.

THE COURT: And you think that assuming the requirement still exists, that just making that statement in a motion is enough to get you over that threshold?

MR. WANDNER: I certainly believe that, Judge. I don't see any requirement we have to file an affidavit or any other vehicle to make a *prima facie* case.

THE COURT: It sounds like a hollow threshold if

that's the case to me.

MR. WANDNER: That's why hearings are heard, Judge. We ask for relief, we present evidence in support of the relief, and we're ready to present that whenever the Court sets the hearing.

THE COURT: And you're ready to, you're saying, now present the threshold evidence on that issue and the threshold evidence on the requirement that you show the government lacks probable cause to seize property?

MR. WANDNER: Judge, if the Court orders us to.

THE COURT: You're prepared to present testimony on this?

MR. WANDNER: If the Court orders us to proceed, I'll do the best I can. I would prefer to have, to the extent the Court suggests that we need to comply with that obligation, I would suggest a recess so that we can get our affairs in order to present that. If the Court says we need to go now, then we'll go now.

THE COURT: Why, so what...

That brings up this issue that the government raised that we're going to have, sounds like, a superseding indictment being sought. And assuming that the Grand Jury issues a superseding indictment on April 19th, what does that do to your argument?

MR. WANDNER: Well, it sounded like to me, Judge,

regarding a case that Mr. Hudson cited, U.S. v. Kaley and I confess I don't have a copy of it, but it sounded like to me from what he was stating is that while the defendant does not have the authority to challenge the probable cause of the criminal charges, which I agree with that to that degree, we do have the right to challenge the nexus between the charges and the property sought to be restrained or to be given back. So that all falls under the same rubric, I would suggest, that we have the right to challenge their claim that the property is tainted when we claim it's not. Specifically as it relates to pretrial restraint of assets under Luis. Because if ultimately those assets were not tainted, we have lost the ability to use them in our own defense. That's why the Court must consider these issues before a trial so that, if the Court makes a determination that they're not tainted, that we have the right to use them in support of our case. If the government just simply gets an indictment, they can prevent us from using those assets, ultimately if their indictment was, you know, flawed or whatever the case may be, we haven't had a chance to challenge it, we've lost the ability to use those assets.

The Court clearly has the discretion and authority and I believe an obligation in this matter to conduct a hearing on the issue of whether or not the funds are tainted. Jones certainly seems to suggest that. I know Luis, it seems like there was perhaps a, the question of whether the assets were

tainted or not seemed to not be in dispute.

THE COURT: So you're saying that even if we were in a context, a different context where the government had already -- the indictment before the court, much like what the government is arguing will be coming, already contained an allegation that the specific property, the 77,000 and change, was subject to forfeiture. Even if that's where we were right now, that he had within the existing indictment specifically stating 777,000 and change is forfeitable criminally, you're saying that you would, upon a showing that you lacked funds for defense-related costs and that you made some showing that the government lacked probable cause, that the government would then have to come forward and prove nexus?

MR. WANDNER: Judge, I think that that's, under Farmer, I think that's still the law. Again, assuming Luis hasn't changed the landscape as it relates to Farmer, I think Farmer says that.

THE COURT: All right.

MR. WANDNER: Farmer says you can --

THE COURT: I should hear from Mr. Hudson again.

MR. HUDSON: Well, Your Honor, courts have considered how much the defense has to offer in order to get to the point where they can actually even have a hearing. And so some of the cases I can -- and merely making an allegation doesn't suffice. Courts have held that defendants cannot rely on self-serving

statements to meet the Farmer requirements, nor can they just make bald allegations. I can offer the Court a couple --

THE COURT: So you need an affidavit at least --

MR. HUDSON: At --

THE COURT: -- which is my gut --

MR. HUDSON: Yes, sir. At a very minimum. And actually one of the cases I cited the Court to earlier talks about that, was that Hernandez-Gonzalez case from the Southern District of Florida that I cited the Court to earlier. It's contained in the government's response brief. And there in Hernandez-Gonzalez, the Court says that the defendant wasn't even entitled to a hearing where he hadn't provided complete financial disclosures. That's the court's words, not mine. Complete financial disclosure. The court said "His assets, liabilities, source of income, net worth, whether he has access to financial accounts and the expected costs of his defense team." That court doesn't stand alone. That's just a post Luis case on point.

There is another case I can cite the Court to, United States v. Vogel from the Eastern District of Texas. 2010 Westlaw 547344 at page Star 3. Court there said "Defendant cannot rely on a self-serving statement regarding the legitimate source of the property to satisfy the second requirement" under their case law that is analogous to Farmer that they have in the Fifth Circuit. Pretty much every circuit has a case that is

analogous to Farmer.

THE COURT: Jones and then --

MR. HUDSON: There's Jones in the Tenth Circuit, yes, sir. There's Farmer in the Fourth Circuit. There is Melrose East and Holy Land Foundation in the Fifth Circuit. Moya Gomez in the Seventh.

THE COURT: So your view is first you argue that defendant is incorrect in his assertion that Luis changed the landscape on what the threshold showing must be?

MR. HUDSON: Yes, sir.

THE COURT: And you've pointed to case law. And secondarily you're arguing even if -- well, assuming that the defendant is incorrect, that to meet the threshold requirement he's got to do a complete divulging of his finances and explain what defense-related costs he may have? I assume that in that regard you wouldn't have an objection to some kind of, on the defense-related cost aspect, there being some kind of *ex parte* showing by defense so they weren't divulging all of their strategy? That seems common sense to me.

MR. HUDSON: I understand that concern, Your Honor. I wonder if they could also file something perhaps somewhat pared down publicly just so if it comes to a point where we have to have another hearing or further briefing on the matter, that the government can intelligently respond to or attempt --

THE COURT: A gross amount. A gross amount with an *ex*

parte breakdown explaining it, might be the way to do that. That is, I expect defense-related costs are $200,000, for example, and then explain why that is to me in an *ex parte* filing.

MR. HUDSON: Yes, sir.

One thing. The Court's saying $200,000 made me think of something, and I do want to mention it before we go too much further. I do want the Court to know that we have actually already released approximately $275,000 worth of assets to this defendant. And the Court is aware? You have that, it sounds like that? Yes, sir.

THE COURT: Yeah.

MR. HUDSON: But I actually, I don't know if the Court wants me to offer -- the last case I told the Court about was United States v. Vogel. I don't know if the Court wants to me to give the Court any other cases. I have plenty of other cases I can give the Court on this point.

THE COURT: They're not in your brief?

MR. HUDSON: Some of them are. Hernandez-Gonzalez certainly is. I think the other one I was going to cite, United States v. Marshall from the Northern District of West Virginia.

THE COURT: What's that cite?

MR. HUDSON: That's 2015 Westlaw 4139368. And there's one other, but it's in the government's brief. I know this one's in the government's brief. United States v. Jamiesson, a

published district court case, Northern District of Ohio. I don't know if the Court wants me to give the cite or just rely on --

THE COURT: No, that's fine.

MR. HUDSON: Thank you, sir.

THE COURT: So you agree that that factor, that threshold factor includes defense-related costs, not just retention of counsel?

MR. HUDSON: That would probably be for defense-related costs too. I cannot think of case law --

THE COURT: That makes sense.

MR. HUDSON: -- off the top of my head that says that. But without ever, you know, waiving my ability to make that argument in the future should case law arise on that point that I become aware of, I agree with the Court, it makes sense.

THE COURT: And on the threshold requirement that the defendant must show the government lacks probable cause to seize the property, counsel has pointed to various filings for that proposition. But does this threshold showing contemplate a hearing, a threshold hearing being held or a filing that has to be made by -- from which the Court then determines after briefing whether such a threshold showing has been made?

MR. HUDSON: The latter, Your Honor. So under Farmer, they actually -- in the Farmer case they use the word threshold to refer to these types of showings. And that's, that would

make sense, if that word means anything there, that it is a threshold showing they have to make.

There's another case, I was flipping around there at the table trying to find it before I came up here. There is a case I'm aware of that -- it may be, it may be the Simpson case from the Northern District of Texas that I cited in my brief. It may be. I feel like this is a case from a distinct court somewhere in Texas, and I think it might, might be the Simpson case. I haven't put my finger on it just yet. But I've seen it before where the court says this is a threshold requirement in order even to get a hearing. In order to even get a foot in the courtroom, a defendant needs to make those threshold showings. And this would be supported by one of the cases that I told the Court about earlier from the Fourth Circuit from 2017 United States v. Johnson. And in Johnson the passage that I read the court from Johnson, "The record also demonstrates that Johnson failed to make a *prima facie* showing that their assets were untainted, so she is not entitled to a hearing under Farmer." I mean that seems --

THE COURT: Untainted means that the government lacks probable cause to seize the property?

MR. HUDSON: Correct. And that seems to suggest you can't even get a foot in the courtroom until you, in your filings, make that threshold showing.

THE COURT: And so if I were to hold that there's no

threshold showing that's been made at this point, and then the defendant did pull together an affidavit and submitted all that the day before April 19th when the Grand Jury is meeting and you say a superseding indictment is going to be issued --

MR. HUDSON: Yes, sir.

THE COURT: -- what happens by the issuance of a superseding indictment in this case that specifically names the $77,000 and change as being forfeitable?

MR. HUDSON: Well, it'll give us yet a third probable cause finding as to this cash, two from a magistrate judge or -- from two different magistrate judges and then one from the Grand Jury as well.

THE COURT: But what does it do -- assuming that once I review all the information I find that the threshold showing has been made, what does it do to the defendant's right to a Farmer hearing?

MR. HUDSON: Then they get a hearing. If they meet those two threshold requirements, then they get a hearing.

THE COURT: Even though you've got the additional superseding indictment with specific property being, there being probable cause --

MR. HUDSON: Yes, sir.

THE COURT: -- that a probable cause finding that specific property is tainted by the criminal conduct which is the same probable cause showing the magistrate judge in this

case has already determined that is probable cause?

MR. HUDSON: Yes. That's correct, Your Honor. So, and that was kind of the point of the Kaley case, as the Court is aware, from the Supreme Court, that in a hearing like this, a Farmer hearing or a Monsanto hearing as the Court referred to it as earlier, you get to challenge the nexus, yes, and then the case law from different circuits, including the Fourth Circuit, makes clear that you have to make the threshold showings to get there, but you can challenge that nexus provided you make those threshold showings, but you cannot go back and challenge the Grand Jury's determination as to the offenses listed in the indictment.

So to answer the Court's question, yes, if a Grand Jury issues an indictment specifically listing the property in question, this $77,000 and presuming the defendant makes the proper threshold showings, I'm not sure I've ever seen any case law, though I can't say I've looked for it, on the issue of can you make a successive Farmer motion. But I guess setting that issue aside for the a moment, yes, they would have the right to a Farmer hearing should they meet the two threshold requirements from Farmer.

THE COURT: Whether it's before the indictment or immediately after?

MR. HUDSON: That would be right, yes, Your Honor.

THE COURT: Well, under your theory, your reading of

the case law, we clearly have no threshold showing having been made at this point. Do we have enough for me to even interpret? I mean, they didn't ask for a Farmer hearing. Do I even have a Farmer motion before me?

MR. HUDSON: That is an interesting question, Your Honor. I don't know. I would submit no, because I did my best in responding to interpret the two pages best I could, but it does not, it doesn't even mention Farmer. It doesn't mention the framework that we've been discussing today that the court has to go through to consider these issues. All of that came in the government's response. And that was based off of my reading of what they meant in their two-page motion. It was just so bare-bones, Your Honor, and I'm not sure the Court can say it properly has a Farmer motion before it. I don't know. I would have to think about it more.

THE COURT: That scares me a little bit, Mr. Hudson.

MR. HUDSON: I'm sorry, Your Honor.

THE COURT: All right. We have this other issue. You know, we're going to take a lunch break. I'm not working all the way through. I just finished seven weeks of a murder trial.

MR. HUDSON: Yes, sir.

THE COURT: So I will tell you all what I think on this, whether I'm going to rule or whether I'm going to issue a opinion on this issue, but probably will just rule when we come back. Then we have the motions *in limine*, motion *in limine* with

respect to numerous questions which, frankly, I've looked at it and doesn't seem like it's going to take up a lot of time to me. But that's where I am.

So it's 1:35. Why don't we come back at 2:35 and hopefully I won't have any jury questions in the meantime.

Thank you, Counsel.

(Recess taken from 1:35 p.m. to 3:38 p.m.)

THE COURT: All right. Mr. Wandner?

MR. HUDSON: Your Honor sir?

THE COURT: All right. Let's come to order, please.

Mr. Wandner, did you want to make some more comments?

MR. WANDNER: Indeed, Judge, if the Court would give me a few moments I would really appreciate that.

THE COURT: So just so you know where I am, it really does seem to me that you need to make the threshold showing and that Luis hasn't changed that, and that you need to do more. I looked back at your motion. It doesn't mention Farmer. I'm going to -- I'm happy to construe it as a Farmer motion, but I think it doesn't -- my preliminary view is it doesn't do what it needs to do.

MR. WANDNER: Okay.

THE COURT: If you want to try to dissuade me from that, I'll give you a few minutes to do that.

MR. WANDNER: I appreciate it.

THE COURT: Yes, sir.

MR. WANDNER: Judge, it seems to me under Luis that because the parties had agreed that the money was untainted that was being restrained and that the defendant needed the money that was restrained for attorneys, they never got to these questions. And so of course the Court only has so much law out there to try to make these determinations and we understand that.

I went back over the break, Judge, and I reread US v. William Todd Chamberlain, case dated August 18th, 2017, a Fourth Circuit case. As new as you can get on this issue. And it follows Luis. And while we cited it in our motion, I didn't necessarily argue it to the extent that I should have in our earlier setting today, Judge. But I think it's critical that I do so.

THE COURT: Okay.

MR. WANDNER: On Page 10 of that decision, the Fourth Circuit states, "Because the court's Constitutional holding" and by "court" they mean the Luis court -- "because the Luis court's constitutional holding did not rest on a close reading of the statute, the court was not called upon to consider, much less decide, whether Section 853(e) permits pretrial restraint of untainted property that is not needed to retain counsel."

So then when you -- and then the court goes on to say "Nonetheless, the Luis court discussion of Section 853 and pretrial restraint more generally presents an opportunity to

revisit our existing interpretation of that provision." So then they go on to analyze it from that perspective. They point out the Luis decision where it states specifically, the Luis plurality explained that "Unlike tainted assets, the defendant's ownership of which is necessarily imperfect, untainted assets belong to the defendant, pure and simple."

Now of course I understand that the issue of whether it's tainted or not is in dispute. The government has agreed that at some point a hearing is necessary. The issue again is who needs to make the prerequisite showing, and I would suggest that the Fourth Circuit --

THE COURT: I guess they have agreed that a hearing is necessary if the showing is made.

MR. WANDNER: Correct. Correct. So what I would suggest to Your Honor is that the Fourth had this in mind when it decided Chamberlain because it specifically questioned that Luis didn't answer this. And the last page of Chamberlain states "With the benefit of these continuing developments, i.e., the Luis decision as well as the most recent pronouncements of the Supreme Court and the government's own evolving views, it is now apparent that our existing precedent construing Section 853 cannot be maintained, and that reconsideration of our minority rule is appropriate." By its plain text, Section 853(e) permits the government to obtain a pretrial restraining order only over those assets that are directly subject forfeiture as property

traceable to a charged offense. Consequently, our precedents to the contrary are overruled," et cetera.

So the Fourth Circuit knew exactly that there was a question left unanswered from Luis. They said it right plain and simple. And in its holding it makes no difference to the Fourth Circuit, in my humble opinion, my argument on behalf of our client, is that it had the opportunity in Chamberlain to state exactly what the government would suggest the remaining law is after Luis, is that we still need to make a showing of need for purposes of cost, counsel fees, et cetera.

My suggestion to Your Honor is that Chamberlain now goes beyond that. It indicates that if the money is untainted, which is still subject to a hearing when it's disputed, and we very well may need to make a preliminary showing through affidavit or otherwise that it is untainted -- doesn't say that we don't need to do that -- but as to the second prong, my argument relates simply to the second prong of showing of need, it seems to me that the Chamberlain court, which had the opportunity to state that we still need to make a showing of need because it clearly references that the Luis court did not rule on that, its ruling is clear: If it's not tainted, not traceable, it needs to be returned.

So my suggestion to the Court is while, even though we believe Luis maintains all the obligations on the government's side based on Chamberlain, we suggest that, at very least, the

second Farmer element of us having to show, meaning the defendant having to make a preliminary showing of need, is no longer applicable at least in the Fourth Circuit so long as the monies in dispute are ultimately determined to be untainted.

THE COURT: It seems circular to me. I'm not sure that -- how do you get there in the first place? You're saying if they're ultimately shown to not be tainted.

MR. WANDNER: Because we have a right to a hearing. Everybody agrees that we have a right to a hearing.

THE COURT: If you're there. If you get there. If you get over your threshold showing.

MR. WANDNER: Right. I'm suggesting is -- let's just say, again, there's an A and a B. If we get over the threshold of showing to the Court that the monies in question, $77,000, are untainted, then we have a right to a hearing. The other element is do we have a need for it in terms of defense costs.

THE COURT: Well, the two threshold showings for getting your hearing are that you lack funds for your defense-related costs and that the government lacks probable cause to seize the property.

MR. WANDNER: Correct.

THE COURT: You're saying if you make your showing on the second one and then we get to the hearing where the government gets to make a showing of its own?

MR. WANDNER: Correct. So what I'm suggesting is

while the first element there's a question mark whether we need to make that preliminary showing of that the money's not tainted, we still believe the government's obligation to do that, but that being said, it really is the second element that we need not show, at least my reading of Chamberlain, we need not show the need, even though we certainly can show it and we certainly do need it. And if the Court orders us to do it, we will do it. My suggestion is under Chamberlain, the Fourth Circuit accepted that there was a question mark on that particular question after Luis, and despite that, ruled simply that if the money is untainted, it goes back to defendant for whatever reason. They did not mandate that there be a need for it to be used for costs or what-not.

THE COURT: All right. Thank you.

MR. WANDNER: Thank you, Judge.

THE COURT: Mr. Hudson, just on Chamberlain, do you want to briefly respond to that new argument?

MR. HUDSON: I'll be extremely brief, Your Honor. Chamberlain is a pretty straightforward case. It holds that the government may not restrain substitute assets pretrial, at least not under 21 U.S.C. 853(e), which was the statute that was prior to Chamberlain most often cited for that purpose. What doesn't Chamberlain talk about? It doesn't comment on the framework to be used in this type of situation; that is, where the defendant is trying to recover funds seized for forfeiture pretrial. I

would submit to the Court that it's very telling that Chamberlain makes no mention whatsoever of Farmer, a Fourth Circuit case that is a published opinion and decided some time in the early 2000s, I forget exactly what year. Chamberlain is an eight-page-long opinion discussing a number of Fourth Circuit cases and explicitly overruling some, but it doesn't have so much as a whisper about Farmer. I would submit to the Court that the reason for that is because the Fourth Circuit saw no tension between Farmer and Chamberlain. The Fourth Circuit identified the cases in Chamberlain where there was tension between Chamberlain and their holdings in those prior cases, specifically United States v. Bromwell, United States v. Bolen and United States v. McKinney. No mention Farmer, no mention of the framework. I submit to the Court that the Fourth Circuit didn't pass on the framework; that is, the requirement to get a Farmer hearing in Chamberlain, it just stated the general rule about restraining or seizing substitute assets pretrial.

And not to go back through them, but I would just point the Court back to Jones from the Seventh Circuit, Stokes from the Northern District of Georgia, and Hernandez-Gonzalez from the Southern District of Florida, all post Luis, all talking about this topic. And I think they're on point.

Unless the Court has any questions, that would be my argument. Thank you, sir.

THE COURT: Matthew, can you step up here?

(Court and law clerk conferred.)

THE COURT: So I think that I'm still of the view that Luis did not change the threshold framework previously established, and I think that on the threshold showing issue, that, you know, what I'm -- I'm going to do is I'm going to deny your original Farmer motion. The clerk will note on the docket that I've denied the motion without prejudice to your right to refile it with appropriate support, the kind of support that's discussed in the Hernandez-Gonzalez case to include a statement of what you anticipate your costs, defense-related costs to be. And publicly you can give a total figure and then you can file an *ex parte*, under-seal filing on the docket reflecting how you break that down, what you expect to be needed, for what purposes in general terms, and then, you know, and why this is the kind of case that justifies those kind of figures.

And then as to the second threshold requirement; that is, that you make some threshold showing that the government lacks probable cause to seize the property, you know, you need to also include that. It needs to be something in the nature of affidavits and -- you know, you mentioned some examination of one of the government witnesses. If you have transcripts, things of that nature, you can attach those. But I need something substantive to show me that there's enough there to justify putting the government to the burden and the test of coming back in here, presenting evidence, bringing people in and

them then having to show probable cause that the defendant committed the charged offense and the property is forfeitable. And it seems to me that Kaley addressed the issue of the defendant committing the charged offense at one level, but I'm sure the government would be prepared to address all of that at a hearing.

This matter is scheduled for trial in September right now, I think. And I never get involved in any discussions, but if you all find that you think there's something that I can rule on that can help you move along in your representation, always let me know of that. And I will await whether you file something else, and it's good to have had you all.

Is there anything else you'd like me to do?

MR. BROCCOLETTI: Yes, Your Honor. We still have the motion *in limine*, if the Court has the ability to hear that. We can certainly -- I don't think that would take long, but it's up to the Court.

THE COURT: No, we'll do it. We'll do it. I need a comfort break.

MR. BROCCOLETTI: Yes, sir.

THE COURT: Maybe 10 or 15 minutes.

(Recess taken from 3:56 p.m. to 4:14 p.m.)

THE COURT: All right. So we turn next to the first motion *in limine*. And as I read the motion, you're requesting a ruling on five categories of evidence regarding the victims'

actual losses, the cumulative amount of all victims' actual losses, the victims' collateral consequences and victim impact evidence involving the personal or emotional hardship caused by the victims' losses, and then the victims' vulnerability to fraud. The government has represented that it does not intend to present any evidence as to the victims' collateral consequences at trial or other victim impact evidence. And so I'd like to -- I appreciate some confirmation that the government agrees that evidence on those two categories should be excluded. That's, again, the victims' collateral consequences and other victim impact evidence. So will the government confirm that that is their position, that they don't intend to offer that?

MS. O'BOYLE: Yes, Your Honor. Victim impact testimony has its place at sentencing. And the government's tried several fraud cases. We, we have no intention on direct testimony eliciting how the loss of their, you know, almost the entirety of their retirement funds has impacted their lives. However --

THE COURT: And some of them are sitting here and they're thinking why, probably.

MS. O'BOYLE: Yes, Your Honor.

THE COURT: But obviously that's the kind of thing that comes up for sentencing.

MS. O'BOYLE: Yes, Your Honor. We don't, as we --

THE COURT: If you get to that point.

MS. O'BOYLE: Exactly. And as we read the cases, there is some concern that courts have that we're inflaming the passions of the jury by eliciting that type of testimony. The government believes that it has an excellent case and that it's going to stick to the factual evidence that it has in its arsenal. However, but like the government said in its motion, if on cross-examination defense counsel through questions, you know, opens doors, then I think that's a slightly different matter. However, the government on direct examination does not intend to go into how the loss of all the their retirement funds has impacted their lives, if they have lost homes, if it's created marital disruption, if they have had to continue to look for work, you know, well into their 70s because they didn't expect not to have this money to live on.

THE COURT: Okay. So the main dispute appears to be about what evidence should be permitted on the victim's actual losses, and therefore I probably need to hear a little bit more about that. I'm unclear about the precise nature of the defendant's request regarding the cumulative amount of all victims' actual losses and of the victims' vulnerability and may need some clarification on that. But let me ask some questions.

In the government's brief it mentions that evidence of actual loss might be relevant for proving materiality. And you cite U.S. v. Rand in which the Court declined to strike a

statement from an indictment as surplusage regarding the victim's actual loss on the ground that they were probative of the materiality of the fraudulent statement. A motion to strike surplusage has a different standard than Rule 403 because the statement must be both irrelevant and prejudicial in order to be stricken. The standard for a motion to strike surplusage does not require a court to weigh the probative value of relevant evidence against the risk of unfair prejudice. There's a case, SEC v. Goldstone from 2016 in New Mexico where the court held that evidence of actual loss had little relative probative value compared to witness testimony pertaining to materiality, and therefore the danger of an emotional response from the jury to the amount of money lost from the victim's retirement savings outweighed the minimal probative value. And we're talking about materiality here, not intent.

MS. O'BOYLE: Yes, Your Honor.

THE COURT: The Court's concern is similar to the Goldstone court, as the government will likely have other evidence regarding materiality. And I was wondering if you want to elaborate on your reasoning for why the evidence is you think admissible for that purpose.

MS. O'BOYLE: Well, Your Honor, I think materiality, the government has to prove materiality, and it's an objective, as the Court knows, it's an objective standard. And so for the victims in this case who have suffered actual losses, losses to

their retirement funds, I think when this defendant conceals that he intends to take 60 percent of their money straight off the top, that he intends to steal that straight off the top for his own personal purposes and that money would never actually make it to the investment, suffering those kind of losses I think goes directly to the materiality of the, their decision in terms of, could they have sustained those losses. People are a lot more careful with their retirement funds than they're going to be with maybe, you know, some, a little extra slush fund that they have when they're 20.

THE COURT: So what are we trying to get at with materiality versus intent?

MS. O'BOYLE: With materiality, it guess to the importance of the monies to the particular person. In connection with these types of funds, the actual loss of these kinds of fund which the defendant well knows is going to be a lot more material, a lot more important to these particular victims than just, you know, monies that are, again, just an extra slush fund that people might have lying around. These are monies that people have worked their entire lives to save. So losses in connection with those types of funds are more important to individuals, objectively, I think, because it's an objective standard, that they're going to be a lot more careful of those investments then they are with other types of monies.

THE COURT: And therefore?

MS. O'BOYLE: And therefore it is the evidence that they have suffered losses to that effect proves that, you know, the materiality of the concealment, the fraudulent statements, particularly when in this particular case we have several, you know, different investments. In one investment it was called Dental Support Plus franchise. The defendant was well aware that in 2014 every person that he put in this investment lost all of their money to the total of three million dollars. And he also then continued to present and sell investments that were originated by the exact same person that created, that created that investment. And so we would offer, certainly offer those losses to demonstrate that an individual, a victim, is -- that those types of losses would be -- that the statements related to that type of investment would be material.

THE COURT: But that's, it's actual -- the actual loss -- well, I guess...

MS. O'BOYLE: It goes to both intent and materiality.

THE COURT: Obviously intent. Intent is the easiest --

MS. O'BOYLE: It is. It is.

THE COURT: -- case to make. It just caught the eye when the materiality argument was made.

MS. O'BOYLE: Yeah. I think materiality goes to the point that we're not just talking about, you know, any old funds that are lying around. I think people, when you have a

defendant that's concealing his true intent what he intends to do with the money, the fact that he's concealing his ownership of companies behind shell corporations such as the investors didn't even know they were handing up their money to him.

THE COURT: But it's still your money. The misrepresentation -- I mean, whether it's for one purpose or another, it's still loss of your own money.

MS. O'BOYLE: I agree with you. And I don't take the loss of regular funds lightly. But I think for these individuals who have saved up their entire lives, saved up a nest egg for their entire lives, they're an awful lot more careful where they're putting their retirement funds.

THE COURT: And therefore you're saying the misrepresentation has to be of a different nature because of the care with which they will watch those funds and that makes what material? It makes what more likely?

MS. O'BOYLE: I think the fact that this defendant lied and concealed that he was planning on stealing 60 percent of the monies in one instance straight off the top, you know, had he informed these people of the true nature of his intent, they never would have entrusted their retirement funds with him.

THE COURT: Okay. Do you intend to mention the victims' cumulative loss at trial?

MS. O'BOYLE: Yes, Your Honor.

THE COURT: For what purpose?

MS. O'BOYLE: Again, to prove, to prove intent. And talking again about the DSPF group, the DSPF example, that happened in 2014, and the defendant was well aware that those losses were sustained. The defendant continued to engage in schemes related to products, that relate to the same co-conspirator, knowing that that particular investment was completely fraudulent.

And then in addition to that, the indictment alleges in connection with both PLI Group Investment as well as the We Monitor investment, there was lulling of these investors well after their, the entirety of their funds were lost. And so the scheme goes through him actually informing three years after one investment was completely kaput, he maintains lulling for three years, and then within 2016 finally tells them that the investment has failed. And so the amount of money that is at issue here is he's actually -- he lies to the victims and claims that all the monies were invested in the actual investment when in reality he had stolen in one instance over a million dollars for himself. So the actual cumulative losses are intertwined with the facts of this case because he continued the scheme even after the losses were sustained and never told the investors to begin with.

THE COURT: So the cumulative loss resulted from the coverup, you're saying?

MS. O'BOYLE: Yes, Your Honor. Both -- yes.

THE COURT: Isn't it -- if I allow victims' actual loss to prove fraudulent intent, it's just a matter of addition to add up actual loss?

MS. O'BOYLE: It would be, but Your Honor, we don't intend to call every single victim at trial. He's got over 300 victims across the country. And so we do not intend to present, to present victims, all of those victims here or we would be here for another -- not seven weeks, but we would be here for seven months.

THE COURT: So the probative nature of divulging cumulative loss to the jury in deciding guilty or not guilty beyond a reasonable doubt is what?

MS. O'BOYLE: It's highly relevant evidence of intent, Your Honor.

THE COURT: Because?

MS. O'BOYLE: It's, as the cases that have kind of outlined this, you know, proof that as in the Copple case, proof that someone was victimized by the fraud is evidence of intent. The fact that people suffered losses and he did not take any steps to remedy that, he just...

THE COURT: We're talking about the cumulative amount.

MS. O'BOYLE: Yes.

THE COURT: This is an amount figure you want to offer up?

MS. O'BOYLE: Yes, Your Honor. I think, I think --

again, I think it's the facts -- it's hard to do in this context because the facts of the case I think will -- I think the context of the trial will kind of go to explain even further the probative value.

THE COURT: Well, I've got to rule.

MS. O'BOYLE: Yes, Your Honor. And I think in this context, particularly in the DSPF Group context, his victims lost over three million dollars in that particular context, and he was well aware of that fact, and then he continued right along to sell investments related to the same co-conspirator --

THE COURT: Okay. So --

MS. O'BOYLE: -- connected with that fraud.

THE COURT: -- are you arguing that it makes it more likely that he engaged in fraud when he knew how much money had already been lost, and that one would normally, in the face of that much money, have taken greater care in any representations made, and that the failure to make such careful representations and divulge information in the face of this large loss is a fact that makes guilt of fraud and fraudulent intent greater? Is that your argument?

MS. O'BOYLE: Yes, Your Honor. Yes.

THE COURT: All right. So why don't I hear from Mr. Wandner on these first two issues.

MR. WANDNER: Mr. Broccoletti will be handling this.

MR. BROCCOLETTI: The B Team, Judge.

THE COURT: Okay. So I don't know if you want to say anything on the materiality issue first and then move on to the cumulative loss; that is, you know, we have multiple categories. Again, we first talk about the victims' actual loss, and you know, it's one thing to talk about admitting evidence to show fraudulent intent to prove that fraudulent intent, it's another thing to argue that it's admissible for purposes of materiality and maybe comes in for one, it doesn't matter so much. You know, we have to sort all that out. But it just struck me on the materiality, I wanted to understand what the basis was for that.

MR. BROCCOLETTI: Well, Your Honor, we set forth in our brief, and the Court is well aware of what the statute requires in terms of elements of the offense in terms of both the mail fraud and the wire fraud, and our brief suggests, and I think the case law also suggests that these issues that we're addressing today are not elements of the offense. Clearly they're not elements of the offense, whether or not they're probative of any of those elements of the offense. And then the court has to do that 403/404 balancing test about whether or not that probative value is outweighed by the prejudicial value and whether or not the government can obtain the same result that they seek to obtain through other means which would not incur the same prejudice to the defendant, which would engender the sympathy and compassion of the jury towards the victims in the

case.

One thing I would like to point out, Your Honor, I think that we've talked about collateral consequences, and the Court and the government have conceded -- well, the government has conceded the fact they're not going to get into collateral consequences. But if you start to get into the introduction of evidence that these individuals invested all of their 401(k)s or IRAs or whatever the circumstances may be, all of their retirement funds, into these investments, and then we move into the fact that they recovered zero of those funds, it does not take a rocket scientist to figure out that loss occurs and they therefore have no further retirement funds. So while we're saying that the government is not going to be introducing from direct evidence any collateral consequences from what occurred through their investments, they are. Because once you start down that road to say they're investing their retirement fund, they have recovered none of this retirement fund, then they have introduced evidence of collateral consequences.

THE COURT: But it's different -- saying I lost five million dollars is different than saying I lost the entirety of my retirement fund. And so it seems to me your concern should be more with I lost the entirety of my retirement fund versus I lost five million dollars.

MR. BROCCOLETTI: Well, I agree. And that is my concern. But my concern goes farther in that the source of the

funds -- I don't see why we need to get in the source of funds. I don't think that's relevant to any considerations.

THE COURT: You mean, to say it's a retirement fund?

MR. BROCCOLETTI: Correct. I think that they can say that they invested X amount of dollars, but we don't need to get into the source of where that came from. Because that then gets to the collateral consequences. Again, it doesn't take -- I'm sure the jury's going to be able to figure out, you've invested five million of your retirement, you've recovered nothing of that, that's a significant impact upon the balance of your life and how you're going to be able to live.

THE COURT: So we're putting a -- the issue here is we have to put a very fine point on what the evidence is and is not. So when Ms. O'Boyle steps back up I guess I'll ask, are you asking, are you saying you want to say five million dollars, or do you want to say five million dollars in retirement funds? That's the fine point you're putting on it.

MR. BROCCOLETTI: Well, I think it is, Your Honor. Because I think that that's, again, what the motion *in limine* is directed at, and that's the prejudice that will enure to the defendant as a result of introduction of that evidence and the sympathy and compassion that the jurors would have for the investors as they testified.

THE COURT: Okay. So that's the first one.

But it's still, I guess, even to the extent that it

comes in to prove intent, you're still concerned about the way that it comes in, in other words?

MR. BROCCOLETTI: Yes sir. That's correct.

THE COURT: I gotcha. Okay. And on the cumulative loss issue did you want, do you want to address that further?

MR. BROCCOLETTI: Well, I think that's also part and parcel of what we argued in terms of the prejudice aspect of it. I don't see -- if you've -- the elements of the offense are set forth. And again, I think that it's clear that as the Copple case points out that the Fourth Circuit's developed a liberal policy to allow the government to introduce evidence regarding losses that are peripherally bearing on the question of intent. So I guess the Court has to make that determination about how far you go in that peripheral determination and how far you allow the government to go in making that peripheral determination to offer evidence that losses occurred are sufficient to be able to establish, I think, the elements or what the government intends to introduce and to be able to establish the intent of the defendant as they may claim it.

I think that the Court also -- I'm sure you're familiar with some of the background of the case -- clearly you're not as familiar as the lawyers are in terms of what the investments are -- but these are venture capital undertaking. It's not that you're investing in AT&T, IBM, before the other day I would have said FaceBook, but in those sorts of

investments. You're talking about speculative, high-risk investments, which are inherently risky. In fact, when the Court will see through the course of the evidence the investment offerings, the placement memorandums, all of the funding agreements, all of the contracts signed between the investors and the defendant, it is a major fact of disclosure that these are high-risk investments. So when one enters into that agreement, one enters in knowing that the substantial risk of loss is present. So again, I think that you have to take that into consideration when you understand what this aggregate amount of loss that the government seeks to introduce against that particular background. The investors went into this knowing that they could lose everything because of the venture capital nature and the high-risk investment it's associated with. So therefore the introduction of the amount of loss, I'd suggest to the Court is not relevant to the extent that it overwhelms or outweighs the prejudice aspect of it in terms of what the amount should be. If the jury hears 20 million dollars, 30 million dollars, 10 million dollars, whatever that may be, it's going to be an eyeopener, and I think that's going to distract them from what the issues in the case will be in terms of the elements of the offense that have been presented when they get their particular instructions.

THE COURT: I guess one thing that I'm struggling with is how -- why isn't this a case where it's inherently

prejudicial because it goes to the scope of the crimes? That is, the cumulative amount? It's inherently prejudicial because it goes to the scope of the crime. You can't get away from that, but that doesn't necessarily make it unduly prejudicial. And that's what I'm struggling with. Why isn't the government entitled to present evidence of the scope of the crimes to the jury? Because you know, the scope of it, if you follow the trail backwards, says something about intent, care, precautions. And you've said, you know, we're going to present a lot of evidence to the jury that warnings were given, that this is speculative, it's venture capital, it's very risky, et cetera. But why isn't the government entitled to -- and you're right, I know nothing more than what's in the indictment and what I've, the little bit that I've read with respect to the bond matter. But why isn't it that you can present the scope and then there are inferences with respect to probative value on some of the elements? That's my problem.

MR. BROCCOLETTI: Well, I think that the government would be able to introduce the scope of the issues without having to get into the aggregate amount of monies or losses that are involved.

THE COURT: How?

MR. BROCCOLETTI: Well, Ms. O'Boyle already talked about the numbers of victims or the number of investors. We'll be talking about multiple different investments. We'll be

talking about multiple different deals. We'll be talking about the types of deals that they were and the types of investments and the types of companies and corporations and startup capital, things of that particular nature. So all of those, that scope I'd suggest to the Court, is going to be able to be addressed in a balancing act that the Court, I think, has to engage in under the federal rules to make that determination. So that evidence and that scope will be, I think, apparent to the jury through the evidence that's going to be presented absent the aggregate amount of losses.

THE COURT: All right. Thank you.

MR. BROCCOLETTI: Thank you, sir.

THE COURT: Ms. O'Boyle, let's move on. Emotional and personal hardship occasioned by the victims' losses. You have said that you don't intend to offer collateral consequence evidence, right?

MS. O'BOYLE: Yes, Your Honor.

THE COURT: And so I don't think we really need to -- you're conceding sort of that issue?

MS. O'BOYLE: There's, there's --

THE COURT: The defendant wanted to be careful about it, raise it, and make sure you weren't going to, weren't planning to try to go there, and you're not planning to.

MS. O'BOYLE: I completely understand. I've spoken with many of these victims. Stories are awful. So I understand

his concern. And the government doesn't intend to -- there is a time and a place for that. If he gets convicted, there's victim impact testimony at sentencing where that kind of testimony is highly relevant.

THE COURT: Where you're less likely to cause someone's ability to judge to be affected.

MS. O'BOYLE: Yes, Your Honor.

THE COURT: Yeah.

So let's see, victim's vulnerability. They have argued that it's unduly prejudicial and not probative to put on evidence of the victim's vulnerability. You've said that you're unclear about what the defendant is objecting to. Do you intend to highlight the victims' vulnerability, and if you do, for what purpose?

MS. O'BOYLE: Well, I don't intend -- I'm, I'm still a little confused about what he's talking about there. The fact that he's trying to say that -- trying to prevent the government from allowing the victims to say that these were for retirement funds when this defendant targeted that particular group of people for this specific crime, he had advertisements, you know, in his weekly radio show. He advertised on the radio both down here in Virginia and in Florida targeting people with retirement accounts.

THE COURT: How so? Tell me what was said.

MS. O'BOYLE: The advertisements talk about, you know,

your IRA is growing -- I didn't bring my notes related to the ads. But they talk about, you know, wanting to -- they have Social Security maximization seminars; that he sends out mailings and has radio ads inviting seniors to a free meal where they sit down and they talk about maximizing their Social Security.

THE COURT: They used the word "seniors"?

MS. O'BOYLE: They used Social Security maximization seminars, Your Honor. And the individuals that are going to those are people that are close to retirement. On his weekly radio show he had a whole segment about fraud on, you know, scams on seniors. And he even represents in the radio show that, you know, a lot of our clients are elderly, a lot of our clients are retirees. So he knows very well who he's targeting with these venture capital investments. And so the idea that we somehow have to present the testimony without having the victims explain to the jury that these were their retirement funds that he had them move from a legitimate 401(k) and IRA with a legit broker to a self-directed IRA account at a trust company that he then directed them where to place those funds, it's intrinsic to the scheme, Your Honor. There's really -- I mean, I'm not even sure how we would go about trying the case without explaining where these individuals got these huge chunks of money. So it's highly probative. I mean, the government's not going to get into, I mean, any maladies that the person has or -- I guess

that's the confusion for me, is what vulnerabilities he's concerned about? You know, we intend to call the victims to testify. I believe at least one of them -- I know at least one of them has eyesight problems, but I think that's going to be kind of apparent from the, from -- the government can't cover that up. Some of them may need aids, you know, the little headphones to be able to hear a little bit better. But the government doesn't intend to, beyond calling them and having them present their testimony, being able to tell, you know, how, how they came in to hire Mr. Bank as their financial adviser and end up with these investments.

THE COURT: Okay. Let me hear from defense counsel.

Thank you.

MR. BROCCOLETTI: Excuse me for one second, Your Honor, I'm sorry.

(Defense counsel conferred.)

MR. BROCCOLETTI: Yes, sir.

THE COURT: Okay. So what does the defendant envision a ruling on this issue encompassing? There's a lock of clarity on that.

MR. BROCCOLETTI: The vulnerability. Is that what the Court's talking about?

THE COURT: Yes. But so, I guess this kind of takes us back a bit, even. If the defendant was advertising in a particular way, that seems to have a relevance that I understand

your argument there's a two-edged sword there that there could be a down side to it. But why doesn't it help the jury to understand intent, at the very least, when someone is going after a certain clientele?

MR. BROCCOLETTI: Well, I think that's where we diverge and disagree. I think the evidence that the Court will hear will be that the defendant and his salesmen, primarily salesmen, advertised to a wide group of people for investments. Young, old, in between, all classes, all forums. And so I don't think that the evidence is going to particularly demonstrate that he targeted the one class of individuals that the Court is indicating in terms of seniors. I think Social Security Maximization doesn't necessarily refer to the targeting of someone's that's on Social Security as it does how to be able to focus and obtain the most out of whatever Social Security benefits you can get by retiring at a particular age. We all get these letters from Social Security saying if you retire at this age you get this amount, if you retire at that age you get X amount, things of that nature. So educational seminars, if you will, with respect to that. But I think that the evidence will show that a wide class of individuals were advertised or subject to advertisements on this particular subject.

THE COURT: And so your argument is that if the reality was that there was $100,000 of advertising money, for example, and it was being proportionately spent over the

demographics of age 30 to age 80, that for the government to come in and only -- to not reflect that disproportionately, suggests to the jury, that the defendant's advertising was at those people in the 70 and 80 range, that it would be prejudicial to the defendant and in and of itself create sympathy that might cause a jury to convict where it shouldn't or wouldn't otherwise?

MR. BROCCOLETTI: Yes, sir. That's correct. And I think that obviously if they introduce one side of the coin, we're going to be introducing the other side of the coin to make a balance.

THE COURT: Well, let's say that part of the -- you know, let's say there was a scheme and the scheme included we're going to kind of get people in this demographic in this way and we're going to get people in this demographic in this way and we're going to get people in this demographic in this way. If the government chooses to put on evidence from a particular demographic, they're not the only demographic, it's still probative, isn't it? It's still probative of how the fraud, alleged fraud was conducted --

MR. BROCCOLETTI: No, I would --

THE COURT: -- or took place.

MR. BROCCOLETTI: Respectfully I would disagree with that. The demographics of the investors is not probative of the scheme to defraud. A scheme to defraud is based upon

misrepresentations, omissions, the classic issues that we see before the court. And so those misrepresentations and those omissions can be directed at any segment of the society, any group of individuals.

THE COURT: So you don't see the -- you see it as, if you target somebody who is in their 70s or 80s they may be an easier target than others?

MR. BROCCOLETTI: No, I can understand that argument. And that would be true if the defendant -- and just for the sake of discussion today -- if the defendant and his company targeted just those individuals. But I don't think that's the evidence. I think that the evidence would show that a number of investors overall -- wrong word to use. Overall groups of investors and all segments of society lost money, not just this one group. And if there were a scheme directed solely at the elderly and infirm and vulnerable and that was the extent of it, then I think that the government's argument would be much more compelling.

THE COURT: So what do you want me to rule? What do you want me to say?

MR. BROCCOLETTI: In a perfect world?

THE COURT: I just, I want to be, I want to make sure I understand what you want me to do. What you're asking me to do.

MR. BROCCOLETTI: Well, I think what we've asked the

Court to do is to, in terms of the aspect of source of the funds, funds were invested. I don't think we need to get into the source of the funds. Because the source of the funds then leads to where, where the money came from, and I just don't see how that's an element or probative of the offense.

THE COURT: Okay. Thank you.

MR. BROCCOLETTI: Yes, sir. Thank you.

THE COURT: So let's start with the legal standard. Although the Federal Rules don't explicitly authorize *in limine* proceedings, obviously the practice has developed pursuant to the district court's inherent authority to manage the course of trials. That's what the Supreme Court recognized in Luce. The purpose of a motion *in limine* is to permit the trial court to rule in advance of trial on the relevance of certain forecasted evidence as to issues that are definitely set for trial without lengthy argument at or interruption of the trial itself. And these motions serve an important gatekeeping function by allowing a trial judge to eliminate from consideration evidence that should not be presented to the jury.

Motions *in limine* to exclude evidence should be granted only when the evidence is clearly inadmissible on all potential grounds, as Judge Cacheris noted in his opinion in Verges in 2014. The principle applies because a court is almost always better situated during the actual trial to assess the value and utility of evidence. In general, motions *in limine*

seeking exclusion of broad categories of evidence are disfavored, as the Sixth Circuit noted in Sperberg v. Goodyear Tire in 1975.

A Court's ruling regarding a motion *in limine* is subject to change when the case unfolds, particularly if the actual testimony differs from what was expected, as the Supreme Court noted in Luce.

A Court considering a motion *in limine* may also reserve judgment until trial so the court -- so that the motion is placed in the appropriate factual context.

Evidence generally is relevant if it has any tendency to make a fact more or less probable than it would be without the evidence and the fact is of consequence in determining the action. However, relevant evidence may still be excluded if its probative value is substantially outweighed by a danger of unfair prejudice under Rule 403. Evidence is unfairly prejudicial when there is a genuine risk that the emotions of a jury will be excited to irrational behavior and this risk is disproportionate to the probative value of the offered evidence.

The briefs discuss whether the evidence at issue here is relevant for purposes of proving mail and wire fraud. To convict a person of mail or wire fraud, the government must show that the defendant devised or intended to devise a scheme to defraud, two, used interstate mail or wire communications in furtherance of the scheme, and three, the statements or

omissions in the mail or wire communications were material to the scheme, and four, defendant acted with the specific intent to defraud.

So turning first to the actual loss issue and defendant's request that evidence of the victims' actual loss be excluded. Defendant is correct that proof of actual loss is not an element of mail or wire fraud. This, however, doesn't mean that evidence of actual loss is irrelevant. As the Third Circuit noted in US v. Copple in 19194. "While proof of actual loss by the intended victim is not necessary in a fraud case, proving specific intent in fraud cases is difficult, and as a result, a liberal policy is developed to allow the government to introduce evidence that even peripherally bears on the question of intent. Proof that someone was victimized by the fraud is thus treated as some evidence of the schemer's intent.

The same rationale for permitting the introduction of evidence of the victim's actual losses in fraud cases in order to prove a specific intent to defraud has been endorsed in two unpublished opinions by the Fourth Circuit as well as numerous other courts. In U.S. v. Noel at 502 F. App'x 284, 2012, the Fourth Circuit noted that the testimony about the victim's financial losses was relevant to prove intent to defraud, citing Copple. And in Zehrback, 98 F. App'x 211, Fourth Circuit 2004, citing Copple they noted, our Circuit did, "In a mail fraud prosecution, evidence that the victim suffered losses and the

defendant refused to make good those losses is relevant to show the defendant's specific intent to defraud."

The Sixth Circuit in Sutherlin, 118 F. App'x, held that in a trial for various frauds, including mail fraud, the government was entitled to introduce proof of investor loss to prove the defendant's specific intent to defraud, and numerous other courts have so held.

The Court therefore considers the example of the Copple court to be instructive and finds that evidence of the victims' losses is relevant for purposes of proving specific intent to defraud.

The Court has also weighed the probative value of this evidence against the dangers of unfair prejudice and finds that the probative value is not substantially outweighed by the risk of unfair prejudice.

Of course the defendant may respond with explanatory evidence if he wishes to do so, but of course a defendant never has to put on any evidence, it's always the government's burden of proof beyond a reasonable doubt whether the defendant cross-examines a witness or puts on any evidence. And the Court still has to make that prejudice/probativeness determination, and it seems to me that actual losses are probative.

Now we may get to trial and there may be some unique circumstance that you want to call to my attention, but as best I can in March with a September trial, that's the best I can do

for you at this point in giving you some guidance. I've already considered the probative value of evidence of the victims' actual loss for the purpose of demonstrating materiality. I find that evidence of actual loss has limited probative value on materiality in view of the other evidence the government will likely present on that issue, because there is some risk that testimony regarding actual loss may be emotional and evoke sympathy from the jury. I find that the probative value of evidence of actual loss for purposes of showing materiality versus intent is substantially outweighed by the risk of unfair prejudice and therefore is not admissible for that purpose.

On the victims' actual -- or excuse me, cumulative losses and the argument that it would be unfairly prejudicial. Because I'm going to permit in broad terms evidence of actual loss, it's common sense that the cumulative total of such losses is admissible. As I alluded to earlier, the jury is naturally caping of doing simple math, and they can easily add the individual victims' losses together and find the sum. The government has represented they may not present all those victims.

As to the argument that the probative value of the total loss figure is outweighed by the risk of unfair prejudice, I agree that the evidence has some prejudicial effect for defendant, but not necessarily unfair prejudicial effect. While I'm unaware of other courts that have ruled exactly on this

issue, numerous courts have denied motions to strike surplusage regarding total alleged loss amounts in fraud cases where a defendant argued that such totals were irrelevant and unfairly prejudicial, such as in the Daugherty case this past year in the Eastern District of Kentucky, declining to strike a reference that a fraud scheme had a potential loss amount to exceed $600 million because the total was relevant to the alleged conspiracy's actual scope, and also because it was not unduly prejudicial. The Beasley decision from the Eastern District of Michigan in 2014 declining to strike a reference to losses of a least 84.18 million from Investments Associated with the scheme to defraud because the total loss was relevant to the government's theory of the case. U.S. v. Hampton from Arkansas, 2006, Eastern District, declining to strike a reference to a tax loss of more than $150,000 because it was not unduly prejudicial and was relevant in that it states the scope of the crimes charged. The Gotti opinion from 2004, Southern District of New York, declining to strike an allegation that the conspiracy involved a loss of more than 5 million because evidence that 5 million was obtained was relevant to an element of extortion in rejecting an argument that the government was seeking to quantify the amount instead of proving merely that some unspecified property was obtained rendered the evidence irrelevant or overly prejudicial.

Similarly, though a different standard applies, the

Court concludes that the total loss figure here is relevant for showing the scope of the crimes charged and is not unfairly prejudicial to the defendant, and will not be excluded. That's even the case if everyone isn't called to testify such that the figures add up to the total amount, I'll still allow evidence of that cumulative figure. And I'll consider whether something becomes in some unique way particularly prejudicial when we get to trial. We're a long way out.

Now, on this issue of emotional and personal hardship or collateral consequences occasioned by the victims' losses, the Court notes that the government has represented that it has no intention of offering this type of evidence in the case. The Court agrees with the parties that evidence of the devastating collateral or emotional and personal consequences occasioned by the victims' actual losses would have little probative value and would primarily serve to highlight the victims' personal tragedy. That testimony would appear to be designed or have the effect of generating feelings of sympathy for the victims and would create a risk that the jury would be swayed to convict Mr. Bank as a way of compensating these victims and potentially have them be blinded to evidence that would not lead to a conviction.

Many other courts have reached the same conclusion regarding these types of victim impact evidence, such as the Cruz court at 601 F. App'x at Page 632, noting that the court

believed that the district court abused its discretion by admitting victim impact evidence in a fraud case.

Sokolow, Third Circuit 1996, holding that evidence of victim's collateral consequence has little if any probative value and may be unfairly prejudicial. And of course Copple, finding the district court abused its discretion by allowing victim impact testimony in a mail fraud case beyond anything that was reasonable to prove Copple, Mr. Copple's specific intent to defraud.

So the Court finds that evidence of the victim's collateral consequences or emotional and personal hardships related to their actual losses must be excluded under Rule 403.

Now, on the victim's vulnerability, as to this issue concerning evidence that the victims' are vulnerable, the government has represented that it does not intend to show that the defendant specifically targeted retirees, as I understand it, but the government does indicate that it wishes to offer evidence that the defendant advertised in a certain way on certain shows and that it does intend to show that it has the effect of targeting a certain demographic, almost all of whom were unsophisticated investors or had some vulnerability in order to show a specific intent to defraud and materiality.

Evidence showing that the defendant intentionally targeted unsophisticated investors has some probative value for both of the purposes for which the government intends to offer

it. In weighing the risk, such evidence would be unfairly prejudicial as the defendant contends, against the probative value of such evidence. The Court finds that the probative value is not substantially outweighed by the risk of unfair prejudice. I also note that even if it were, if I were to rule that evidence of the victims' vulnerability may not be highlighted by the government, it would be impossible to prevent the jury from naturally inferring from the victims' own testimony that they may have some particular vulnerabilities to fraud. That being said, I will keep an ear out and an eye out to efforts at exacerbating or unduly playing on the emotions of the jury with respect to vulnerability. That's a fine line to draw when the manner of the conduct of a fraud may be inextricably intertwined with the vulnerability. And so it's a line that will have to be drawn in the proceedings once the Court has a better feel for it all. But I think it's going to be difficult because of them being intertwined.

So I find that evidence concerning the victim's vulnerability is to some extent admissible for purposes of showing intent to defraud and materiality of any fraudulent statements.

And I think that that has addressed all of the grounds of the motion *in limine*, if I understand it.

The motion to reconsider, Ms. Yusi, I think you were the one that wrote that? My view is that I can deal with that

separately. I don't need to have argument today on that. There's no additional briefing necessary on that, is there?

MS. YUSI: No, Your Honor.

THE COURT: Is any additional briefing necessary on that?

MR. BROCCOLETTI: No, Your Honor.

THE COURT: Then I will rule on that separately.

Is there any other way I can help you all?

MR. BROCCOLETTI: Go ahead.

MS. O'BOYLE: Not at this stage, Your Honor.

MR. BROCCOLETTI: If I could, Judge?

THE COURT: Yes.

MR. BROCCOLETTI: Two things. One -- and I don't like to go backward, I always like to go forwards -- but if we could get a ruling from the Court on the source of the funds that we did argue today?

THE COURT: Yeah.

MR. BROCCOLETTI: And then secondly with respect to the motion to be able to sell the home and to escrow the proceeds, if the Court wants us to brief that, if the Court just wants to issue an opinion as it's going to on the bond modifications, that's fine as well.

THE COURT: So let's deal with the source. Whether they came from retirement funds?

MR. BROCCOLETTI: Yes, sir.

THE COURT: So I think that I just think it is, that is part of the concept of being inextricably intertwined. And the probative value -- you know, if I understand -- it's been some time since I read the entire, read the indictment, and I -- but it seems to me that the government's theme is that the defendant was looking to a particular demographic and looking to a particular demographic, and the way things are pitched to that demographic bears on the intent of the defendant in particular in light of the various risks involved with the investment and people's insecurities or securities. And frankly, frankly, if your theory of the case is we divulged the risk, we told people what the risk was, they knew how risky it was and how speculative it was and that's the evidence you're going to present as your theory of the case, it seems to me, frankly, that there's two -- it's a two-edged sword; that is, that someone who is investing retirement funds would be particularly careful and would be hesitant to invest in a speculative investment, and for a jury to know that fact actually may benefit the defendant. But irrespective of whether it benefits the defendant or not, it also affects how the government presents its case of the defendant's intent to defraud. And I just think it is sort of -- it's hard to pull it apart. And you know, if something unique comes up I'll hear about that at trial. But I think they're not to unduly dwell on it, and it's not to -- getting in that it's coming from retirement funds is

not to spill over into I lost my entire retirement savings, therefore in the jury's mind this person is out on the street or whatever, or there's some, such that the jury's ability to have, to look at the evidence in a dispassionate way and reach a just and fair verdict is in some way clouded. You know, I'm going to be sensitive to that. So we're not to get into that. And your witnesses need to be, you know, you need to explain to them that you may get this, you may get out that it came from retirement funds, but the way in which you do that I'll be sensitive to, to balance this.

Now, the sale of the house and the escrow and the bond, hold on a second.

(Court and law clerk conferred.)

THE COURT: I don't feel like I need to hear any additional argument. But honestly, after this day and everything that I've been through for the last seven weeks, I just can't listen to any more. I really can't. So if you -- do you all want to file anything any supplemental brief on that issue?

MR. BROCCOLETTI: I wasn't suggesting Your Honor that you hear any more from the lawyers. You've heard more than enough from the lawyers. I think that we've submitted enough to you and we rely upon the submissions.

THE COURT: You're comfortable with me ruling --

MR. BROCCOLETTI: Yes, Your Honor.

THE COURT: -- on what you submitted?

MR. HUDSON: It has been fully briefed, Your Honor, in the government's view.

THE COURT: Okay. We'll get to it. I'm quite backed up, as you can imagine. And so we will get to it as soon as we can.

All right. Well, thank you all for your arguments.

MR. BROCCOLETTI: Thank you, sir.

(Whereupon, proceedings concluded at 5:20 p.m.)

CERTIFICATION

I certify that the foregoing is a true, complete and correct transcript of the proceedings held in the above-entitled matter.

Paul L. McManus, OCR

Digitally signed by Paul L. McManus, OCR
DN: cn=Paul L. McManus, OCR, c=US, email=pmcmanusocer@verizon.net
Date: 2018.05.25 11:54:21 -04'00'

Paul L. McManus, RMR, FCRR

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Date